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{SHOW } PROCEEDINGS AND ORDERS DATE: 111684

CASE NBR 83-1-01367 CSY
SHORT TITLE Florida DOCKETED: Feb 13 1984
VERSUS Rodriguez, Damasco V. TIME QUESTION

Date	Proceedings and Orders
Jan 10 1984	Application for extension of time to file petition and order granting same until February 13, 1984 (Powell, January 11, 1984).
Feb 13 1984	Petition for writ of certiorari filed.
Mar 21 1984	DISTRIBUTED. April 13, 1984
Apr 11 1984	Response requested. (Due May 11, 1984 - NONE RECEIVED)
Jun 5 1984	REDISTRIBUTED. September 24, 1984
Oct 1 1984	Record requested.
Oct 12 1984	Record filed.
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 29 1984	REDISTRIBUTED. November 2, 1984
Nov 5 1984	REDISTRIBUTED. November 9, 1984
Nov 13 1984	Petition GRANTED. Judgment REVERSED and case REMANDED Justice Marshall dissents. Dissenting opinion by Justice Stevens, with whom Justice Brennan joins. Opinion per

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****

83-1367

NO.

In the

Supreme Court of the United States

October Term, 1983

THE STATE OF FLORIDA,

Petitioner,

vs.

DAMASCO VINCENTE RODRIGUEZ,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal
Of Florida, Third District

BRIEF OF PETITIONER ON JURISDICTION

151 pp

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QUESTIONS PRESENTED

1) WHETHER THIS COURT SHOULD EXERCISE JURISDICTION, WHERE THIS COURT REVERSED THE SAME STATE COURT WHICH DECIDED ROYER UPON THE AUTHORITY OF FLORIDA v. ROYER, ___U.S.___, 103 S.CT. 1319 (1983) AND ON REMAND THE STATE COURT INSTEAD AFFIRMS THE DISMISSAL OF THE PRESENT PROSECUTION UPON THE AUTHORITY OF ROYER AND SAID AFFIRMANCE REPRESENTS "A GRAVE MISCARRIAGE OF JUSTICE" AND IS "UNJUST, UNREASONABLE AND PLAINLY WRONG?"

2) WHETHER THE DECISION OF THE FLORIDA COURTS, 1) THAT THE FACTS HEREIN CONSTITUTE A STOP UNDER ROYER AND FURTHER THE FACTS DO NOT AMOUNT TO ARTICULABLE SUSPICION UNDER ROYER AND 2) THAT THE CONSENT TO OPEN THE DEFENDANT'S LUGGAGE WAS ILLEGAL BECAUSE HE WAS NOT WARNED HE HAD A RIGHT TO REFUSE THE SEARCH, IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH THE RULE OF THIS COURT IN UNITED STATES v. MENDENHALL, 446 U.S. 544 (1980); SCHNECKLOTH v. BUSTAMONTE, 412 U.S. 218 (1973); TERRY v. OHIO, 392 U.S. 1 (1968) AND FLORIDA v. ROYER?

3) WHETHER THE EXCLUSIONARY RULE SHOULD BE APPLIED TO PRECLUDE THE PRESENT PROSECUTION WHEN THE POLICE ACTED IN GOOD FAITH?

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Appellant in the District Court of Appeal of Florida, Third District, and the prosecution in the Florida trial court. The Respondent, DAMASCO VINCENTE RODRIGUEZ, was the Appellee in the Florida District Court and the defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in the Petitioner's Appendix and consist of pages A1-A100.

I.

OPINIONS BELOW

The second opinion of the Florida Third District Court of Appeal affirming the Florida trial court's granting of the Defendant's Motion to Suppress will be reported in Southern Reporter Second Series (West 1983). The opinion of the Florida District Court is contained in the State's Appendix at A 99.

The original opinion of the Flroida Third District Court of Appeal which was reversed by this Court is reported at State v. Rodriguez, 389 So.2d 4 (Fla. 3d DCA 1980), reversed, ___U.S.___, 103 S.Ct. 2115 (1983) and is contained in the Appendix at A 92 West's Southern Reporter is the official reporter for citation to these opinions.

II.

JURISDICTION

On November 15, 1983, the Florida Third District Court of Appeal again affirmed the granting of the Defendant's Motion to Suppress. The Florida District Court, however, stayed its mandate pending an appeal to this Honorable Court. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257 (3) and Amendements IV, V and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. Hetland v. State, 366 So.2d 831 (Fla. 2d DCA 1979), approved and adopted, Hetland v. State, 387 So.2d 963 (Fla. 1980).

The Florida District Court per curiam opinion, makes the Florida District Court the Court of last resort herein as a matter of law. See, Dodi Publishing Co. v. Editorial America S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V of the Constitution of the United States provides inter alia that:

> "[No person] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV of the Constitution of the United States provides that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

STATEMENT OF THE CASE

The Defendant, Damasco Vincente Rodriguez, was charged by information with possession of cocaine with intent to distribute arising out of his attempt on September 12, 1978, to transport three (3) pounds of cocaine contained in his luggage, through Miami International Airport, Miami, Florida. The Defendant filed two Motions to Suppress in which the Defendant claimed his Fourth, Fifth and Fourteenth Amendment rights under the United States Constitution were violated. See, A 2-A 11. After an evidentiary hearing, the Florida trial court granted the Defendant's motions. A89-A90.

At the hearing upon the Motion to Suppress, the only witness who testified

was Officer Charles McGee of the Dade County public Safety Department. A 14. McGee related that he first saw the Defendant at 12:40 P.M. on September 12, 1978, at National Airlines ticket counter. A 15. The Defendant was standing in line with a soft vinyl suitcase and a gold plastic suitbag with zippers which were padlocked shut. A 32. Officer McGee observed that the Defendant did not buy a ticket but instead trailed two other individuals, subsequently known as Ramirez and Blanco. A 36. Ramirez had purchased a ticket with a large role of cash. A 35. Ramirez upon purchasing a ticket walked over to Blanco and whispered to Blanco, who then walked by the Defendant and whispered to him. A36-A37. As Ramirez walked out of the ticket area past the Defendant and Blanco, he did not look at them. A 39.

As Ramirez reached the end of the roped-off ticket purchasing area, Blanco left the ticket line and walked out behind Ramirez. A 39. Blanco then looked quickly from side to side as well as behind him and the Defendant left the ticket line and followed behind Ramirez and Blanco. A 40. During that time, neither Blanco nor the Defendant conducted a transaction at the ticket counter. A 41. Officer McGee and his partner, Facchiano, then followed the three men to the National Airline's departure area where they proceeded onto an escalator. A 42. On the escalator, Ramirez and Blanco were standing side-by-side, the Defendant was directly behind them, and McGee and his partner were four steps further back. A 43. While on the escalator, Blanco and Ramirez conversed between themselves but not with the Defendant. A 44. At the top of the escalator, as Blanco looked back toward the Defendant, he

made eye contact with McGee. A 45. Blanco then turned quickly back to Ramirez and spoke briefly with him and Ramirez then quickly looked back at the officers. A 46. As the three men stepped off the escalator, Blanco turned and said to the Defendant, "Let's get out of here." A 48. The Defendant then stopped and Blanco repeated, "in a much lower and strained voice, 'Get out of here.'" A 48.

At this point, the Defendant then turned, with suitcases still in hand, and looked directly at McGee. A 48. The Defendant immediately started moving in a very hurried fashion to his left. A 49. McGee described the Defendant's actions in the following manner:

> "THE WITNESS: He was moving in a direction to the left. His legs were pumping up and down

very fast and not covering much ground, but the legs were as if the person were running in place. You might say moving slightly to the left. There's a wall or partition there. He ran through that partition and in the area just enclosed off.

THE COURT: Did he run or walk?

THE WITNESS: Neither He was pumping up and down.

THE COURT: You said he ran up a minute ago. Did he go from a walk to pumping to a run?

THE WITNESS: Well, Your Honor, I don't know what the right word would be, but his feet are running up and down but he ain't going nowhere except a little at a time.

Do you understand what I'm saying?

BY MS. COHAN:

Q Detective McGee, can you come down from the witness stand and show us?

THE COURT: Like running in place?

THE WITNESS: Sort of like this (indicating).

To demonstrate, he was standing with his suitcase and shoulder

bag when the guy told him in a strained tone to get out of here. He turned and looked at me. He was going like that. He didn't know what to do. He was just going crazy. His feet was going up and down and he was moving, but -

THE COURT: All right. Have a seat."

A49-A51.

The Defendant's comical attempt to flee the officers continued thus:

"[THE WITNESS]: After Mr. Rodriquez moved to the left to that position where the was was, he started to go around it looking into that area. There is no exit, jut walls. He then turned and came back out and passed me again still in the same pumping fashion and went to the other side of the escalator to my right. I am standing there just watching the guy running around in circles.

THE COURT" Maybe that's the way he walks.

> THE WITNESS: He ran to the right and went that way. He ran back and got right in front of me. He looked at me square in the fact. He said, 'Oh, shit.'"
>
> A51-A52.

While the Defendant was engaged in this activity, Blanco and Ramirez were standing off to the side. A 52. When the Defendant passed by Blanco for the second time, Blanco told the Defendant to "go check the bag." A 55. The Defendant then stopped in front of Officer McGee and said, "Oh, shit." A 56. McGee then identified himself and asked if he could speak to the Defendant for a moment and the Defendant said,"yes sir." A 59. McGee then asked if the Defendant would mind walking over to where his friends were with the other officer and the Defendant turned and proceeded the short distance. A60-A62.

After the Defendant rejoined the other two men, McGee asked if he had any identification and an airline ticket. A 65. While the Defendant said that he had none, Ramirez handed McGee a National Airlines ticket to LaGuardia in the names of Martinez, Perez and Rodriguez. A65-A66. discussion then ensued during which both the Defendant and Blanco stated that they were Rodriguez. A 68. After the discussions concerning identification, McGee and his partner indicated that they were narcotics officers who were assigned to seek to combat the problem of drug trafficking through the airport. A 74. After this advisement, the following ensued:

> I made some statement to Mr. Rodriguez about the display of his movements upon coming off of the escalator. I advised him that it caused me some concern from my observations and I asked

him at that time, "So would you have any objection if I searched your luggage?"

He said, "I don't."

The suitcase was down on the floor. I am pointing down to the suitcase. He says, "I don't have a key."

Before I could say anthing else, Ramirez was watching me that that point and Ramirez said to Rodriguez, "Let him look."

Rodriguez reached in his pociet and extracted a key. It was loose. It wasn't on a key chain or anything. He handed me a key which I placed in the lock and opened it.

Q Did you demand that Mr. Rodriguez consent to seach of his luggage?

A No, ma'am. I asked him if he had any objections. He said, "I don't have a key."

Q Did you tell anything such as he didn't have a choice in the matter?

A No, ma'am."

A75-A76.

McGee took the key, opened the suitcase, and found three-and-one half pounds of cocaine. A 77. The Defendant was then arrested and handcuffed. A 79. Prior to the discovery of the cocaine, the Defendant was free to leave. A 80. After the Defendant was advised of his Miranda rights, he stated "It's my dope. I am not going to get these other guys involved." A81-A82.

The only evidence presented below was the unrebutted testimony of Officer McGee. Upon the foregoing facts the prosecutor argued in vain that the transaction was a mere contact within the meaning of United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977); and Terry v. Ohio, 392 U.S. 1 (1968) and that the Defendant's consent was valid under Schneckloth v. Bustamonte, 412 U.S. 218 (1973). A83-A87. Upon the testimony of Officer McGee, the Florida trial court

made three (3) distinct rulings. First, during the hearing, with respect to the approach by the officers, the trial court opined, thus:

> "MS. COHAN: Your honor, this officer as a police officer has no less right to go up and engage a citizen in voluntary conversation than does a Hare Krishna.
>
> THE COURT: I think he does have less right because his work and his duties and responsibilities and what he is attempting to do are entirely different than than of an ordinary citizen.
>
> MS. COHAN: Not at all.
>
> THE COURT: Well, I disagree with you. Go ahead. I am not going to permit that answer, anyway."
>
> MS. COHAN: Your Honor is apparently taking the position that he has less right than a normal citizen. The State does not take that position and I would also at this point object to not being able to inquire as to those matters.
>
> THE COURT: It's in the record."

A28-A29.

Subsequently, with regard to the bizarre actitivy of the Defendant; the whispering and apparently furtive relationship of the three men, the trial court made its position clear:

> "THE COURT: I could rule at this point there was no reason to stop this man and for the sake of argument. I am not determining as a matter of fact at this point, but for the sake of argument I could say it was an illegal stop and there was no probable cause for an articulable fact or reasonable founded suspicion to stop this man, but that still doesn't visciate necessarily what occurred thereafter. So, let's go from that point."

A71-A72.

Finally, with respect to the Defendant's consent to search the bag, the trial court granted the Defendant's Motions to Suppress holding that:

"THE COURT: I am going to grant the motion for this reason: I do not think that there has been a sufficient showing by the State that the consent was completly untainted and freely and voluntarily given; that the defendant was never told that he had the right to leave. He was never told that. He had the right to refuse to have his baggage searched and that he never verbalized a consent to the search of his luggage. I do not believe that the intervening statement by a companion to let him look is sufficient in the time frame that occurred here to over come the taint of the lack of showing that his man had a right to refuse the search of his luggage or he had a right to refuse the search of his luggage or he had a right to leave, and therefore under the totality of the circumstances, I am going to grant the motion."

A88.

Apparently, under the Florida trial court's view, the State is charged with not only the conduct of its officers, but must also be responsible for remarks of co-defendants. The trial court's written order similarly

provides as a matter of law relying upon the United States Constitution that:

"1. There was no reason to stop the Defendant, Damasco Vincente Rodriguez. The Defendant did nothing which would arouse an articulable suspicion in the eyes of Detective McGee and Detective Facchiano.

"2. Due to the lack of telling the Defendant he had a right to leave, the lack of telling the Defendant he had a right to refuse to consent to a search, there was an insufficient showing that the consent herein was completely untainted due to the lack of the two things previously mentioned.

"3. The statement made by the Defendant's companion did not overcome the taint from the initial illegal stop of the Defendant."

A89-A90.

On appeal to the District Court of Appeal of Florida, Third District, the State specifically relied upon this court's

decision in United States v. Mendenhall, 446 U.S. 544 (1980). A91. The Florida District Court disposed of all issues summarily holding that:

> "PER CURIAM.
>
> "Affirmed on the authority of State v. Battleman, 374 So.2d 66 (Fla. 3d DCA 1979)."
>
> A92.

The State filed a petition for rehearing, which was subsequently denied. A93-A97. The mandate of the Florida District Court was stayed pending appeal to this Court. A98.

On May 26, 1981 this Court denied certiorari, Florida v. Rodriguez, 451 U.S. 1022 (1981), but three justices dissented,

stating that they would reverse on the jurisdictional briefs:

> "THE CHIEF JUSTICE, Justice BLACKMUN and Justice POWELL would grant certiorari and reverse the judgment."
>
> Id.

On May 25, 1983, this Court granted rehearing; granted certiorari and reversed for further proceedings under Florida v. Royer, 460 U.S.___, 103 S.Ct. 1319 (1983). Florida v. Rodriguez, ___U.S.___, 103 S.Ct. 2115 (1983).

Pursuant to the mandate of this Court in Florida v. Rodriguez, supra, the Florida Third District Court of Appeal reconsidered the present cause. On November 15, 1983, the Florida District Court again affirmed the trial court's granting of the Motion to

Suppress. A 99. The District Court again however stayed its opinion pending review in this Court. A100. On January 12, 1984 Justice Powell granted a timely request for an extension of time in which to file the present petition.

V.

SUMMARY OF ARGUMENT

This Court should accept jurisdiction, where this Court reversed the same state court which decided Royer, upon the authority of Florida v. Royer, ___U.S.___, 103 S.Ct. 1319 (1983), and that state court instead affirmed the dismissal of the present prosecution under Royer. It is a plain waste of this Court's time and efforts if the miscarriage of justice in the present case is left to stand despite this Court's direction.

Furthermore, the present decision either demonstrates a disregard or misapplication of Florida v. Royer. The State court dismissed the present criminal charges upon the holding: 1) that the facts herein constitute a stop and the facts do not

amount to articulable suspicion and 2) that the consent to open the Defendant's luggage was illegal because he was not warned he had a right to refuse. The repeated affirmance of such a ruling has no lawful basis in Royer or any other decision of this Court. The District Court affirmance herein is a "complete miscarriage of justice" and is "unjust, unreasonable and plainly wrong" and is in direct and substantial conflict with the rule of this Court in United States v. Mendenhall, 446 U.S. 544 (1980); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); and Terry v. Ohio, 392 U.S. 1 (1968) and Florida v. Royer.

The present Florida Third District Court of Appeals centered in Miami, Florida, is the leading appellate court in Florida and is one of the most prolific state courts

in any jurisdiction. As such it also influences the law of search and seizure substantially. Miami is also an major drug terminal for the United States. See, United States v. Mendelnhall, 446 U.S. 544 at 562 (Powell, J.; The Chief Justice and Blackmun, J., concurring). The present cause is therefore important to the exercise of jurisdiction from the stand point of the importance of the decision and court involved and the compelling interest in curbing narcotics traffic. See, Mendenhall 446 U.S. at 561-562 (1980) (Powell, J., concurring); Florida v. Royer, 103 S.Ct. at 1332 (Blackmun, J., dissenting). This Court's plurality opinion in Royer has not served to correct the present plainly erroneous analysis by the same state court that decided Royer. Therefore the present cause is also of substantial importance in that

it would clearly serve to define the parameters of the court opinion in Royer, which the Royer state court apparently believes have left the present issues in some doubt. See, also, Florida v. Royer, 103 S.Ct. at 1336 (Rehnquist, J.; The Chief Justice and O'Connor, J., dissenting).

VI.

ARGUMENT

A.

In the present case, the state trial court was of the opinion, 1) that police officers may not approach citizens on a public concourse without articulable suspicion; 2) that the present encounter was an unlawful "stop" because there were insufficient grounds for articulable suspicion and 3) that evidence of the "consent" to open the Defendant's bag was insufficient because the Defendant was not warned he had a right to refuse and that he had a right to leave. See, A89-90. The trial court's views are without lawful basis. The Florida District Courts affirmance of the trial court's views was therefore summarily reversed by this Court in Florida v. Rodriguez, ___U.S.___, 103 S.Ct. 2115 (1983), relying upon Florida v. Royer, 460 U.S.___,

103 S.Ct. 1319 (1983). The present court is the same state court as in Royer.

Despite the foregoing the Florida District Court has refused to follow Royer and again has affirmed the trial court's erroneous analysis. This Court has jurisdiction to correct such error and should exercise it, particularly where this Court has already expended time and effort considering this cause and the error is plainly a miscarriage of justice.

The trial court's first and third conclusion have been soundly rejected by eight (8) justices in Florida v. Royer, 460 U.S. ___, 103 S.Ct. 1319 at 1324 (1983). See, also, United States v. Mendenhall, 446 U.S. 544 (1980); Terry v. Ohio, 392 U.S. 1, at 19 n.16, (1968); United States v. Smith, 649 F.2d 305 (5th Cir. 1981); United States v.

Fry, 622 F.2d 1218 (5th Cir. 1980). In Mendenhall, the Court explained the underlying analysis, which Royer reaffirmed:

> "We adhere to the view that a person is "seized" only when by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554, 98 S.Ct. 3074, 3081, 49 L.Ed.2d 1116.
>
> "On the facts of this case, no 'seizure' of the respondent occurred. [1] The events took place in the public concourse. [2] The agents wore no uniforms and displayed no weapons. [3] They did not summon the respondent to their presence, [4] but instead approached her and identified themselves as federal agents. [5] They requested, but did not demand to see the

respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon an constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approach her, asked her if she would show them her ticket, and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official." [Emphasis added].

446 U.S. at 555.

Furthermore, Mendenhall concluded that warnings of a right to refusal are not constitutionally required to obtain consent and concluded that the government's evidence of cooperation was undisputed. Id, at 557-558; see, also, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). As in Mendenhall and consistent with the mandate of Royer, Mendenhall and Terry v. Ohio, there is no testimony that the Respondent

did anything other than to voluntarily cooperate with the officers and voluntarily provide the officers with access and did consent to an examination of his luggage.

The only evidence was the the Defendant said that he did not have any objection to the officer's search of his bag. The fact that he denied having a key only contributed to articulable suspicion. See, Discussion, infra. The undisputed evidence was that Ramirez without prompting from the officer urged the Defendant to let the officers look in the bag and in response to Ramirez the Defendant produced the key. The State is not responsible for the Defendant's partners-in-crime, who suggest that he cooperate with the police. Cf., Coolidge v. New Hampshire, 403 U.S. 443 (1970).

Furthermore, there is no evidence but that the officers merely approached and engaged a citizen in a voluntary conversation. See, Royer, 103 S.Ct. at 1324. The entire transaction took place on a public concourse, within fifteen feet of the original encounter and concluded within two or three minutes.[1] The trial court's second premise that the Defendant was "stopped" therefore cannot be rationally sustained under Royer and Mendenhall. In the present case as in Mendenhall and Royer, the events, 1) took place upon a public concourse; 2) the officers wore no uniforms and displayed no weapons; 3) the officers did not summon the Defendant; 4) but instead the officers approached him and identified themselves; 5) requested

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1 Ironically, defense counsel was very critical of the officers herein because they did not move to a room, "where [the defendants]

but did not demand the Defendant's identification and ticket and 6) the officers posed a few questions, the primary of which was the bizarre conduct of the Defendant at the mere sight of the officers. These circumstances do not rationally amount to a "stop" within the meaning of the United States Constitution. See, Royer, Mendenhall, Terry. There is no basis to sustain the trial court's views. This Court should therefore again take this case to correct the present egregious error and the Florida District Court's refusal to adhere to this Court's views in Royer, Mendenhall and Terry.

(Footnote 1 continued)
wouldn't be embarrassed." Transcript of Proceedings at 93. Compare, Florida v. Royer.

B.

Additionally, the Florida courts absolute rejection to the facts herein as not amounting to articulable suspicion within the meaning of the Fourth Amendment is utterly erroneous. The failure of the Florida courts to properly apply this Court's recent decisions in Royer and Mendenhall is emblematic of their persistent failure to properly apply Terry v. Ohio, in the airport context. See, Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980). Where the officers are suspicious of an individual because of the profile characteristics, they may conduct a valid investigatory stop when they are "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." see

United States v. Pope, 561 F.2d 663, 667 (6th Cir. 1977) citing Terry v. Ohio, 392 U.S. at 27; Royer, Mendenhall. The officers herein did not stop the Defendant and his associates until they had plainly observed conduct which furnished "reasonable suspicion." In the officer's initial observations, the Defendant and his companions were acting peculiarly. When Blanco made eye contact with McGee on the escalator, this caused Blanco to whisper to Ramirez, who immediately turned to look at the officers. As the three men exited the escalator, Blanco turned and told the Defendant, "Let's get out of here." When the Defendant stopped, Blanco repeated, "Get out of here[,]" causing the Defendant to turn, with suit cases in hand, and look at MCgee. The Defendant then started trying to leave the area by scrambling around like the proverbial headless chicken. All of

activity subsided when the Defendant ran back in front of McGee, looked him square in the face, and stated, "Oh, shit." That this behavior furnished the articulable facts necessary to create reasonable suspicion for an investigative stop cannot seriously be gainsaid. Indeed the State submits that the false identity by the Defendant's companion when asked who he was, together with the Defendant's falsehood about whether or not he had a key, only substantiated the experience observations of these narcotics officers.

Along each carefully defined step, from initial observation to investigative stop, the officers' conduct was completely in compliance with the applicable legal requirements. Compare, Florida v. Royer. The meshing of practical police considerations and Fourth Amendment theory

is stated by this Court in Delaware v. Prouse, ___U.S.___, 99 S.Ct. 1391, 1396 (1979):

> "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonablen s" upon the exercise of discretion by government officials, including law enforcement agents, in order, "to safeguard the privacy and security of individuals against arbitrary invasio[n]..." Thus, the permissibility of a particular law enforcement practic is judged by balancing its intrusion on the individual's Fourth Amendment interests against it promotion of legitimate governmental interests. Implemented in this manner, the reasonableneee standard ussually requires at a minimun, that the facts upon which an intrusion is based by capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." [Citations and footnotes omitted].

See, also, Royer, 103 S.Ct. at 1324- 1325.

In Adams v. Williams, 407 U.S. 143 at 145-

146 (1972), this Court also explained:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a ciminal to escape. On the contrayr, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. See id., at 88 S.Ct. at 1881. A brief stop of a suspicious invididual, in order to determin his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts know to the officer at the time. [citations ommitted.]"

See, Royer, Id. The Florida Courts conclusion that any stop herein was unlawful is absolutely erroneous. With a proper detention the Defendant's consent was the therefore untainted by any prior illegality

and hence lawful consent was shown by the undisputed evidence. Compare, Florida v. Royer. There is also no evidence to warrant a conclusion that anything more than a brief detention had occurred. Compare Royer; United States v. Place, ___U.S.___, 103 S.Ct. 2637 (1983) (ninety (90) minute detention unreasonable where officers knew well in advance of defendant's arrival).

The present Florida Third District Court of Appeal is the same state court as in Florida v. Royer. The affirmance of the present unlawful ruling of the State trial court by the Florida Third District Court of Appeal relying upon Florida v. Royer, is nothing less than a completely erroneous construction of Royer and the Constitution. This Court in Royer in no

way approved a finding of no articulable suspicion in the face of the present circumstances and the flight of an airline passenger upon the approach of plain clothes officers. Yet the very court from which Royer emanated is contruing this Court's opinion in such a manner. Furthermore, the present state court ruling also sustains the trial court's unlawful holding that the present transaction was a constitutional stop and that any consent herein was unlawfully "tainted". The Florida Third District Court has again declined to apply the "balancing test" mandated by Florida v. Royer, and Terry v. Ohio. This Court has jurisdiction and should correct the plain misconstruction of Royer and the United States Constitution.

The present Florida Third District Court of Appeal centered in Miami, Florida, is the

leading appellate court in Florida and is one of the most prolific state courts in any jurisdiction. As such it also influences the law of search and seizure substantially. Miami is also an major drug terminal for the United States. See, United States v. Mendenhall, 446 U.S. 544 at 562 (Powell, J.; The Chief Justice and Blackmun, J., concurring). The present cause is therefore important to the exercise of jurisdiction from the stand point of the importance of the decisions and court involved and the compelling interest in curbing narcotics traffic. See, Mendenhall 446 U.S. at 561-562 (1980) (Powell, J., concurring); Florida v. Royer, 103 S.Ct. at 1332 (Blackmun, J., dissenting). This Court's plurality opinion in Royer has not served to correct the present plainly erroneous analysis by the same state court that

decided Royer. Therefore the present cause is also of substantial importance in that it would clearly serve to define the parameters of the court opinion in Royer, which the Royer state court apparently believes have left the present issues in some doubt. See, also, Florida v. Royer, 103 S.Ct. at 1336 (Rehnquist, J.; The Chief Justice and O'Connor, J., dissenting).

C.

To extend the effect of the exclusionary rule to the present circumsstances and similar causes in the future would amount to only blind imitation of the past. Even in that imitation, it is not possible that the Framers of the Constitution ever intended two hundred years later that the prohibitions of the Fourth Amendment would be extended to release airport narcotics couriers, rapists, murderers and other felons in the face of unimpeachable evidence of their criminality, which has been seized in good faith. See, United States v. Williams, 622 F.2d 80 (5th Cir. 1980) (en banc). The application of the exclusionary rule to the good faith actions of these officers is nonsensical and contrary to any intended purpose under the United States Constitution. See, United States v.

Williams, supra; see also, Stone v. Powell, 428 U.S. 465, 496-516 (1976) (Burger, J., concurring). Where the exclusionary rule has served its purpose it should not be extended now such that all it serves to do is to frustrate the lawful interdiction of narcotics traffic. See, Stone v. Powell; Williams, supra. This Court should therefore also accept jurisdiction on this ground for consideration with the presently pending decisions in this Court on the so-called good-faith exception to the exclusionary rule.

VII.

CONCLUSION

WHEREFORE, based upon the foregoing, this Court should accept jurisdiction.

RESPECTFULLY SUBMITTED, on this _____ day of February, 1984, at Tallahassee, Leon County, Florida.

JIM SMITH
Attorney General

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Assistant Attorney General
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APPENDIX TO

BRIEF OF PETITIONER ON JURISDICTION

App. 1

INDEX

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

CASE NO:78-13968

THE STATE OF FLORIDA

Plaintiff,

vs.

DAMASCO RODRIGUEZ,

Defendant.

MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH UNREASONABLE SEARCH AND SEIZURE

COMES NOW the defendant, DEMASCO RODRIGUEZ, by and through his undersigned counsel and respectfully moves this Court pursuant to rule 3.190(h) of the Florida Rules of Criminal Procedure, for unlawfully as the result of an illegal search and seizure: Approximately three pounds of a white powdery substance purported to be Cocaine.

In support of the foregoing motion the defendant would state as follows:

1. The purported Cocaine referred to the above was illegally seized without a warrant. (Rule 3.190(h)(1), of the Florida Rule of Criminal Procedure).

2. The facts upon which motion is based are as follows:

On September 12, 1978, approximately 12:30 p.m., Mr. Damasco Rodriguez entered the Miami International Airport with two other persons, one of whom purchased a ticket for Mr. Rodriguez to take National Airlines Flight 136 to New York LaGuardia Airport which was scheduled to depart on September 12, 1978, at 1:00 p.m., Mr. Rodriguez at this time had in his possession a soft leather samsonite suitcase. There was nothing unusual or

remarkable about this samsonite suitcase. While standing in the appropriate line to check in his suitcase, Mr. Rodriguez was approached by Detective J. Facchiano, of the Public Safety Department. At this time, Detective J. Facchiano, -emanded that Mr. Rodriguez open the relevant samsonite suitcase. Thereupon, Mr. Rodriguez merely acquiesced to the legal authority of Det. Facchiano, who thereupon, opened said suitcase without Mr. Rodriguez freely and voluntarily consenting to this search. Upon opening said suitcase, Detective J. Facchiano discovered the substance here in issue.

3. The Defendant respectfully sub-

mits that the initial stop by a member of the Public Safety Department and the search and seizure which followed were unlawful and in violation of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article I Section II of the Florida Constitution and the recent Florida Supreme Court case of Coladonato v. State, 348 So.2nd 326 (1978).

4. That the Defendant never freely and voluntarily consented to the search of the relevant suitcase and that he merely acquiesced to the apparent lawful authority of Detective J. Facchiano who demanded that the defendant open his suitcase. See, United States v. Rodriguez, 525 F.2nd 1313 (10th Cir. 1975), Brown v. State, 330 So. 2nd 861 (4th DCA 1976), Barley v. State, 319 So.2nd 22 (1975), Powell v. State, 332 So.2nd 105 (1DCA 1976).

5. The Defendant submits that there was no probable cause to support the issuance of a search warrant in the instant cause as required by Florida Statute 933.06.

6. The Defendant submits that the purported "drug profile" which may have been used in the instant case of of doubtful validity, especially in light of the fact in this case which did not support a finding or probable cause for the initial stop or detention, and certainly do not support a finding or probable cause required for the search and seizure and arrest which have taken place in this case.

WHEREFORE, for good cause shown and based on the above and further based upon the attached memorandum of law and facts applicable to this case, the defendant respectfully moves this Honorable Court to

enter an order granting his motion to suppress the illegally seized evidence in the instant cause.

[FILED '79 JAN 11]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

CASE NO:78-13968
(Judge Richard S. Hickey)

STATE OF FLORIDA

Plaintiff,

vs.

DEMISCO RODRIGUEZ,

Defendant.

MOTION TO SUPPRESS DEFENDANT'S CONFESSIONS, ADMISSIONS AND STATEMENTS

THE DEFENDANT, by and through his undersigned counsel, respectfully moves this Honorable Court to suppress as evidence at the time of trial in the above-styled cause all written and oral statements made by the Defendant to the police or other agents of the State or the State of Florida pursuant to Rule 3.190(i), Florida Rules of Criminal Procedure and as

grounds states as follows:

1. The written and oral statements were obtained from the Defendant in violation of the Defendant's rights to counsel and the Defendant's privilege against self-incrimination guaranteed by the Fifth, Sixth and the Due Process Clause of the Fourteenth Amendment to the United States Constitution as interpreted by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2. The written and oral statements from the Defendant were not freely and voluntarily given, in violation of the Defendant's rights quaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Article I, Section 9 of the Florida Constitution (1968).

3. The written and oral statements were obtained from the Defendant in violation of the Defendant's right to be free of unreasonable searches and seizures guaranteed by the Fourth And Fourteenth Amendments of the United States Constitution and by Article I, Section 12 of the Florida Constitution (1968). Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Bethancourt v. State, 224 So.2d 378 (3rd D.C.A.1969); French v. State, 198 So.2d 668 (3rd D.C.A.Fla.1967).

4. The written and oral statements were obtained from the Defendant in violation of Florida Statute Section 901.06 and Section 901.23. Oliver v. State, 250 So.2d 888 (Fla.1971); Jacobs v. State,248 So.2d 48 (1st D.C.A. 1971).

5. The written and oral statements obtained from the Defendant are not supported

by an independent prima facie proof of the corpus delecti of the crime for which the Defendant is charged.

[FILED '79 JUN 29]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 78-13968

STATE OF FLORIDA,

vs.

DAMASCO V. RODRIGUEZ,

Defendant.

Metropolitan Justice Building
Miami, Florida
Thursday, 10:00 a.m.
May 10, 1979

THIS MATTER came on for hearing before the Honorable RICHARD S. HICKEY, Circuit Court Judge, Criminal Division, pursuant to Notice.

APPEARANCES:

JANET RENO, STATE ATTORNEY
By: RINA COHAN, ASSISTANT STATE ATTORNEY
ON BEHALF OF THE STATE OF FLORIDA.

JEFFERY WIENER, ESQ.,
ON BEHALF OF THE DEFENDANT.

THEREUPON:

THE COURT: There is no showing that he is hostile at this time. You have to take that up at the proper time.

MR. WIENER: Your Honor, he is.

THE COURT: You have no right to ask leading questions on your direct examination unless you can show that he is hostile. If he declares he is a hostile witness, then you can cross examine.

MS. COHAN: Your Honor, I would also state there are no depositions taken in this matter. In order to show the witness is hostile you have to claim surprise.

THE COURT: Well, there could be other things.

Let's proceed. We will determine that.

MR. WIENER [DEFENSE COUNSEL]: We will call Officer McGee.

Thereupon -

OFFICER CHARLES McGEE

was called as a witness by the Defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WIENER:

Q. Officer, please state your full name and occupation.

A. My name is Charles McGee. I am a police officer with the Dade County Public Safety Department.

Q. Where are you assigned to work?

A. Currently assigned to the Organized Crime Bureau, Narcotics Squad, Airport Division.

Q. Does that mean you work at the airport?

A. Primarily, yes, sir.

Q. Is part of your training to try to detect people in civilian clothes walking around the airport who you believe may be carrying contraband?

MS. COHAN: Objection. Leading.

THE COURT: I will permit it. Overruled.

THE WITNESS: My purpose at the airport is just to intercept marcotics and identify narcotic couriers, no matter what kind of clothing they are wearing or anything they are wearing.

BY MR. WIENER:

Q. They all were civilian clothes, don't they?

A. I really couldn't answer that. So far, in my opinion, everyone I arrested has civilian clothes, I believe.

Q. Now, sir, did there come a time when Damasco Vicente Rodriguez, the defendant in the case first came into your view?

A. Yes, sir.

Q. What time was that, and what day?

A. It was September 12th, 1978 at ap-

proximately 12:40 p.m.

Q. And what was Mr. Rodriguez wearing?

A. He had an open collar shirt on, a print shirt, and I believe he had dark trousers on, possibly black. I can't remember for sure the color of the trousers.

Q. Is there anything unusual about the way he was dressed?

A. Not to my recollection.

Q. Okay, sir.

When did Mr. Rodriguez come to the airport?

A. I'm not sure. I first noticed him at the National Airlines ticket purchasing line.

Q. Now, sir, is it not a fact when you come into the airport, there are baggage handlers that check baggage as you go into the airport, but they are still

outside on the sidewalk as you pull up in your car or in a taxicab?

MS. COHAN: Objection. Leading, Your Honor.

Counsel has asked a series of leading questions. I would ask the Court at this time to admonish him.

THE COURT: Sustained.

Proceed, Counsel.

[Thereupon defense counsel presented testimony of Officer McGee]

[Thereupon the prosecutor presented State's evidence also consisting of Officer McGee's testimony]:

MS COHEN [the prosecutor]: Your Honor, I am prepared to rest on the hearing right now.

THE COURT: Well, it isn't up to you to rest. It is still his case.

MR. WIENER: It is the State's burden

to show the defendant voluntarily submitted to the search. That shifts to you.

MS. COHAN: That's correct.

THE COURT: Okay.

MS. COHAN: I will proceed.

CROSS EXAMINATION

BY MS. COHAN[Prosecutor]:

Q. Detective McGee, have you had any special training in narcotics?

A. Yes, ma'am.

Q. Would you tell us what it is.

A. Starting when I first joined the Police Department in my academy days, the Academy gives you approximately 40 hours - about a week's worth of narcotic training.

MR. WIENER: Excuse me. I would like to object on the grounds of relevancy. We are not talking about a case here where the officer smells a substance or sees white powder.

THE COURT: She has a right to show that he is somewhat of an expert based upon his experience and training. I will overrule the objection.

MR. WIENER: An expert in what?

MS. COHAN: Narcotics investigation.

THE COURT. Investigation, police work.

THE WITNESS: After that time period I spent a year in uniform and had some contact with street narcotics sale and arrest cases through the uniform portion of my training. After that I assigned to the Orgainized Crime Bureau and Narcotics Squad.

Upon being assigned to the Narcotics Squad, I recieved a five-week course with the Orgainized Crime Bureau which encompassed approximately a week and a half to two weeks of narcotic training surveillances and the techniques and identification of drugs.

After that I took a two-week course with the Drug Enforcement Administration, an 80-hour course which I graduated from with a certificate indicating the schooling was for analysis of drugs indentification by sight, smell and of the ways and means of drug use, the transfer, sale and surveillance techniques.

I further spent a week with Nove University and another drug-related school again in identification and testing of narcotics. I had further a one-week school with the Dade County Public Safety Department in the analysis of narcotics trafficking as far as telephone analysis surveillances and the making of conspiracy cases through narcotics.

Also I have had 18 months experience with the airport unit and at this time made numerous cases in the field of nar-

cotics as far as marijuana, cocaine, heroin and amphetamine pills. I also have has a total or approximately three and a half years in narcotics work investigation alone.

BY MS. COHAN:

Q. Pursuant to your duties at the airport, you come in contact almost on a daily basis with other police departments, other agencies, other police personnel concerning the airport situation, don't you?

[Objection overruled]

THE WITNESS: Yes, ma'am, we do.

BY MS. COHAN:

Q. And pursuant to your duties, you have had occasion to watch passengers on almost a daily basis, don't you?

A. Yes, sir.

Q. About how many passengers do you watch on an average day?

A. Thousands.

Q. You go up and speak to thousands of passengers?

A. No, ma'am.

Q. Which passengers do you go up and speak to?

[Objection sustained]

BY MS. COHAN:

Q. Do you all day go up and stop people and have them consent to a search of their luggage? Is that what you do?

A. No, ma'am.

Q. What do you do?

A. We make -

MR. WIENER: Objection, Your Honor, as to the relevancy about other cases. How he described his job really doesn't matter. It is what happened in this case.

THE COURT: You have a forked tongue on this issue. I am going to overrule the objection.

Answer to question.

BY MS. COHAN:

Q: What do you do?

A. We make observations at the airport based upon police experience in training in narcotics and observations made of passengers over a time period at the airport. We become accustomed to ways and means of passengers traveling through the United States via Miami International Airport. We look for things that come to our attention that would bring what I would consider a reasonable and prudent man to be suspicious.

MR. WIENER: Objection as to the conclusion, what a prudent man would do.

THE COURT: Sustained.

MR WIENER: That is exactly what I objected to.

MS. COHAN: What he does and why he

does it, not what a reasonable and prudent man would do.

THE COURT: That's not the way the answer was coming out.

BY MS. COHAN:

Q. Detective McGee, would you tell us what you do. Complete your answer.

THE COURT: Are you considering yourself as a reasonable prudent man or what a reasonable prudent man would do under the circumstances?

THE WITNESS: I think I used the wrong word. I am not sure how I meant that. To rephrase it, I should say I look for things that to me as a constant observer of people at the airport are unusual.

MR. WIENER: Judge, I will object to that as to what he considers unusual. Who cares.

MS. COHAN: Your Honor, it is most

relevant.

MR. WIENER: That's not relevant to anything. I think it's unusual.

THE COURT: I think that's a well-taken point. Sustained.

[Thereupon objections and a discussion ensued]

THE COURT: Well, I am going to listen to it, Counsel.

Go ahead.

THE WITNESS: Based upon what I observed at the airport, and it becomes suspicious in my mind and coupled with actions that I observe, anything that I see that a person would do that would be out of the normal realm.

MR. WIENER: Objection to what he considers to be the normal realm.

THE COURT: Sustained.

THE WITNESS: Or -

MR. WIENER: Excure me, Your Honor. There were no questions pending.

MS. COHAN: Your Honor, to go back for defense counsel, the question is what he does.

THE COURT: Go ahead. What do you do?

THE WITNESS: Upon seeing certain facts that draw my attention, I then at that time as a police officer go to a person if I feel that it warrants it, and with that, upon going to him I identify myself as a police officer and request that person if they would have any objection to talking to me. If they so submit to a conversation, the conversation ensues.

[Objection sustained; answer stricken]

BY MS. COHAN:

Q. Is the consent to which you were referring to the consent of a citizen to speak with you on a voluntary basis?

A. Yes, ma'am.

Q. It is not a consent to search. It is a consent to a conversation?

MR WIENER: Objection. Again, Your Honor, this is what concerns me. I don't mean to belabor the point, Judge Hickey. She is essentially taking her own witness through a nice little story.

THE COURT: He is your witness. She has got him on cross. Now, you can get him back on redirect.

MR. WIENER: All right, sir.

THE COURT: You may be able to show he is hostile on redirect. I don't know. You keep saying her witness. You called him. He is your witness. It is your motion.

Proceed.

BY MS. COHAN:

Q. The consent to which you were re-

ferring is to partaking in conversation with you similar to what a person at an airport would partake to a person like a Hare Krishna?

MR. WIENER: Objection. That's irrelevant. Normally the Hare Krishna asks if you want to by a flower for a dime.

MS. COHAN: I am permitted to ask leading questions. If he knows the answer ---

THE COURT: What do Hare Krishnas have to do with this matter?

BY MS. COHAN:

Q. Detective McGee, have you seen Hare Krishnas go up and talk to people at the airport?

MR. WEINER: Objection as to relevancy.

THE COURT: What is the relevancy?

MS. COHAN: Your Honor, this officer as a police officer has no less right to go up and engage a citizen in voluntary conversation than does a Hare Krishna.

THE COURT: I think he does have less right because his work and his duties and responsibilities and what he is attenpting to do are entirely different than that of an ordinary citizen.

MS. COHAN: Not at all.

THE COURT: Well, I disagree with you. Go ahead. I am not going to permit than answer, anyway.

BY MS. COHAN:

Q. Detective McGee, is it not a fact that when somebody tells you they do not wish to speak to you and you have approached them on a voluntary basis, they can walk away if they do desire?

[Objection overruled]

A. Yes, ma'am, they are free to leave.

BY MS. COHAN:

Q. Have you had people previously who have said I am not talking to you, I am walking away and off they do?

MR. WEINER: Objection, Your Honor. It is irrelevant what has happened previously.

THE COURT: I really think it is irrelevant. Sustained.

MS. COHAN: Your Honor is apparently taking the position that he has less right than a normal citizen. The State does not take that position and I would also at this point object to not being able to inquire as to those matters.

THE COURT: It's in the record.

BY MS. COHAN:

Q. Do you watch any specific flights?

A. Yes, ma'am. We watch flights for target cities.

Q. Is the flight to LaGuardia a specific flight that you watch?

A. Yes, ma'am.

Q. Why is that?

A. Miami being a source city for narcotics --

[Objection overruled]

from our observations made at the airport and arrests made through somewhat of an analysis of these arrests, we have found that certain cities, major metropolitan areas such as LaGuardia is a center distribution point for narcotics. We watch flights to these certain areas more specifically than we would, say, to a place like Asheville, North Carolina or something where the flow of narcotics would be in fact greater.

BY MS. COHAN:

Q. On September 12 of 1978, you were watching the passengers on the departing flight to LaGuardia, weren't you?

A. Yes, ma'am.

Q. You observed somebody in the ticket line who subsequently became known to you as Damasco Rodriguez, did you not?

A. Yes, ma'am.

Q. Did you see Mr. Rodriguez purchase his own ticket?

A. No, ma'am.

Q. What did you see in line?

A. Mr. -- my first observation of Mr. Rodriguez when he was in line, he was in possession of a brown bag that I described earlier with the zippers and the padlock, a gold-silver. He was hanging it from his shoulder. It's a suitbag. He was in line. There were approximately four or five people back in the ticket purchasing line for National Airlines. He was in possession of the baggage. As I said, the bag itself that he was holding in his hand in line, he never did set the bag down. He kept it in his possession. Directly behind him was a second gentleman. They were separated by a space that indicated that they were not, in fact,

traveling together. They were separated as if to separate their existence between each other. It was a space of approximately two feet.

[Objection sustained]

BY MS. COHAN:

Q. Was there anyone else in line?

A. Yes, ma'am. There were several other people in line. I took no notice of anyone else at that time. My first notice was that the --

[Objection sustained]

BY MS. COHAN:

Q. What, if anything, drew your attention to Mr. Rodriguez?

A. The first thing that drew my attention to Mr. Rodriguez was the gold suitbag that he was in possession of. The gentleman that was directly behind him in line was also in possession of the identical same gold suitbag.

Q. What happened next concerning these two individuals?

A. Seeing the two identical bags at that time drew my observation to them to ascertain if in fact they were together. Being that the bags were exactly alike, I thought they were together, but they never had any conversation and I kept making observations of those two individuals, trying to anticipate if they were in fact together.

At the point that Mr. Rodriguez reached the head of the ticket line, and he would be the next person to proceed to the counter, there was a third gentleman that came to my view at that time. He was at the National ticket counter. He was at the last position. Mr. Rodriguez was facing the ticket counter and he would be to his extreme right. This

gentleman was a -- what appeared to be a Latin male, a large Latin male, and he was at that time purchasing a ticket or at least I assumed he was. The first thing that came to my observations was a large quantity of cash up on the ticket counter and then subsequent to that I saw some form of a ticket folder being passed to that gentleman.

[Objection sustained]

BY MS. COHAN:

Q. How much cash did you see? What is the thickness?

A. The bills were scattered out as I remember it on the counter. He may have had them all together at one point. I didn't personally make any observations as to the amount. It looked to me like ten to fifteen different bills, the denominations of which I don't know.

Q. After you observed what appeared to be a ticket folder handed to that individual at the counter, what did you then observe?

A. Prior to the ticket folder being handed to the gentleman at the counter, that gentleman removed himself from that ticket counter and turned and looked up and down the terminal slowly and walked over to the second gentleman, the gentleman behind Mr. Rodriguez. This gentleman subsequently was identified as Mr. Blanco. The gentleman at the counter himself was named Mr. Ramirez. Mr. Ramirez turned and walked to Mr. Blanco and leaned towards him so that his mouth was in close proximity to his ear. I could see Mr. Ramirez' mouth moving as if articulating something, at which point he then turned and walked back to the ticket counter.

Mr. Blanco at that time turned and looked behind him and to each side where he could scan the complete area.

[Objections sustained].

BY MS. COHAN:

Q. After Mr. Blanco turned, did he turn his head up on his neck?

A. Yes, ma'am. His head turned in a rotating fashion with his eyes from the point I could see, his eyes were fixed in a straight head position not showing the whites of the eyes to either side indicating he was staring out of the one corner yet turning his head indicating that his head and eyes were moving simultaneously in a sweeping motion from one side to the other throughout the terminal.

Q. What happened then?

A. Mr. Ramirez had responded to the ticket counter itself. Mr. Blanco then, after making this motion with his

head as I have described, he then took one step forward again doing the same thing that Mr. Ramirez had done, placing his mouth in close proximity to Mr. Rodriguez' ear. Again, as I saw the mouth movement and at that point Mr. Blanco stepped back and assumed the position he had had. This is the first conversation I had seen. Mr. Rodriguez never turned and never looked back and never opened his mouth. He never showed any recognition of this gesture.

[Objections sustained]

[Thereupon various objections were sustained]

[By the Prosecutor]: What occurred after the observation you had made of Mr. Blanco moving his mouth in Mr. Rodriguez' ear?

A. When Mr. Blanco had returned to the position he was originally at, Mr. Blanco then drew his attention, his head turned in the direction of the gentleman, Mr. Ramirez, who was at the ticket counter.

Mr. Ramirez upon receiving the ticket folder then proceeded through the exit area which would be going past Mr. Blanco, past Mr. Rodriguez and then up through the roped area. I observed Mr. Ramirez as he proceeded past. He in no way turned his head towards either Mr. Blanco or Mr. Rodriguez. He proceeded directly on through. As he reached the end of the roped-off area where it says exit, meaning to leave the ticket purchasing counter, as he reached that area, the gentleman, Mr. Blanco, then left the ticket line and proceeded past Mr. Ramirez and past the ticket counters and exited

also in that same area trailing directly behind in a few feet back of Mr. Ramirez.

Mr. Blanco at that time stood there momentarily and then still with baggage in hand he quickly turned his head from one side, from the extreme left to the extreme right and his body twisting in such a manner as to look completely back behind him.

[Objection overruled]

BY MS. COHAN:

Q. Then what happened?

A. At that point Mr. Rodriguez then left the ticket line. He was the next person to be waited on. He left the ticket line and proceeded out that same exit, that roped-off area, the same exit area and followed directly behind Mr. Ramirez and Mr. Blanco.

At this point Mr. Blanco was catching up to Mr. Ramirez and Mr. Rodriguez stayed behind them a short distance, two or three feet.

Q. What luggage did you observe in the possession of any one of those three individuals?

A. Mr. Ramirez was in possession of a leather or vinyl-leather looking suit-bag with a zipper. Mr. Blanco was in possession of a small tote bag and a suit bag gold in color exactly identical to the one I described that Mr. Rodriguez had, and of course Mr. Rodriguez had the gold suitbag and bronze suitcase.

Q. Besides the transaction you observed at the ticket counter, did you observe either Mr. Rodriguez or Mr. Blanco carry on any transaction at the ticket counter?

A. No, ma'am.

Q. In fact, they never got to the ticket line while waiting at the ticket counter, did they?

A. No ma'am.

Q. Where was Detective Facchiano while this was occurring?

A. We were both on the outside area of the ticket purchasing line. At some point we had sat down directly across from the counter. We may have gotten up and moved about. We were right in the general area where the observations were made.

Q. What happened as you were walking down the concourse, if anything, or the lobby?

A. We proceeded to follow them to Concourse F, which is a departure gate for National Airlines. We were trailing back a little ways. The two gentlemen, Mr. Ramirez and Mr. Blanco, as they reached

the escalators going to the upper level, which is the security checkpoint for National, they were standing side by side on the escalator. Mr. Rodriguez then assumed the position directly behind the first two gentlemen still in possession of his leggage.

Myself and Detective Facchiano also entered the same escalator approximately four steps back from Mr. Rodriguez who was like the second step back from Ramirez and Blanco. Everyone was still in position of the same piece of luggage that I had described earlier.

The first two gentlemen, Blanco and Ramirez, were involved in conversation. I did not overhear the conversation per se. I saw the lips moving and I could overhear voice inflexion and tone, but the words I was not even trying to make out.

Q. What you overheard, did one person say something and then the other person responded?

A. Yes, ma'am. It was a conversation from one to the other and then back and forth again.

Q. Was this in Spanish or English?

A. As I said, I didn't try to overhear the words and I couldn't say.

Q. Who was talking to each other?

A. That was between Mr. Ramirez, the guy at the counter, and Mr. Blanco, the guy behind Rodriguez in line.

Q. Did these gentlemen then proceed up the escalator?

A. Yes, ma'am.

Q. What, if anything happened?

A. No conversation was exhibited between either the first two gentlemen and Mr. Rodriguez or vice-versa. Upon

reaching the top of the escalator where Mr. Blanco who was at that point involved in the conversation with Mr. Ramirez looked back towards Mr. Rodriguez and then his eyes came in contact with my eyes at which time he looked at me for just a second, but at a steady stare, a steady glaze, steady eye contact.

Q. Who was that?

A. That's Mr. Blanco, the guy second in line.

Upon the stare or eye contact being broken, he turned back to Mr. Ramirez who he had been in conversation with and leaned towards him. I saw his lips moving, but you know, the tone had dropped. I couldn't hear any tone or inflection.

[Various objections and discussion]

BY MS. COHAN:

Q. What happened after that?

A. After he had the very short lip movement with Ramirez that I could no longer hear, Mr. Ramirez then turned and looked directly towards me and my partner, the same as Mr. Blanco had done. Mr. Ramirez turned back quickly. His head was moving in a verry, very fast snapping motion to Mr. Blanco. Again I saw lips moving from this time.

[Objections and discussion]

THE COURT: Let's proceed.

BY MS. COHAN:

Q. After that occurred, immediately in fact, after that occurred, did Mr. Blanco then say something to Mr. Rodriguez?

A. At this point, the escalator still moving up while these two gentlement are doing this, at this point when Ramirez had turned back, they were just at the top. They both stepped off at the escalator and took about two steps. In fact,

he was just off that middle plate at the top of the escalator. I stopped dead on the escalator.

Detective Facchiano went between me and Mr. Rodriguez and proceeded towards the area where the first gentleman was who--let me try to explain this.

Ramirez and Blanco were first on the escalator. As they stepped off and proceeded towards the security check point, Ramirez walked ahead placing Ramirez in front. Blanco was a couple of feet behind him and then Rodriguez backed two steps off the escalator approximately two, three and a half feet maybe from Blanco.

Q. Were they all in line like this?

A. Well, it was a staggered line. They weren't in perfectly a straight line, one like here, there and there (indicating). They were separate.

Q. You were closest then to Mr. Rodriguez?

A. I was directly behind him.

Q. Okay.

A. Blanco turned and looked directly at Rodriguez and he said, "Let's get out of here."

Rodriguez made no motion. He just stood there and stopped dead. I'm just standing there watching. I haven't moved.

Rodriguez with the bag in hand stood there just momentarily. I couldn't see his facial expression or anything else. Blanco looked at him. His eyes moved up causing the white area of his eyes to expand as if in an exclamation look.

MR. WEINER: Objections as to--

THE COURT: Sustained.

THE WITNESS: And he said in a much lower and strained voice, "Get out of here."

At this point Mr. Rodriguez with his suitcase in hand turned and looked

at me and in a very hurried motion shot to the left. It was like--I can't describe it as a run definite. It was not a walk. It's such a short area. He was moving. He never got into a run because it was a short distance.

MR. WEINER: I'll object to his conclusion that he didn't get into running. Maybe he just turned around.

THE COURT: Sustained.

THE WITNESS: He was moving in a direction to the left. His legs were pumping up and down very fast and not covering much ground, but the legs were as if the person were running in place. You might say moving slightly to the left. There's a wall or partition there. He ran through that partition and in the area just enclosed off.

THE COURT: Did he run or walk?

THE WITNESS: Neither. He was pumping up and down.

THE COURT: You said he run up a minute ago. Did he go from a walk to pumping to run?

THE WITNESS: Well, Your Honor, I don't know what the right word would be, but his feet are running up and down but he ain't going nowhere except a little at a time. Do you understand what I'm saying?

BY MS. COHAN:

Q. Detective McGee, can you come down from the witness stand and show us.

THE COURT: Like running in place?

THE WITNESS: Sort of like this (indicating).

To demonstrate, he was stamping with his suitcase and shoulder bag when the guy told him in a strained tone to get

out of here. He turned and looked at me. He was going like that. He didn't know what to do. He was just going crazy. His feet were going up and down and he was moving, but--

THE COURT: All right. Have a seat.

BY MS. COHAN:

Q. The area in which you were located has two escalators, does it not?

A. Yes, ma'am.

Q. And those two escalators both go up?

A. Yes, ma'am.

Q. There is no down escalator?

A. No, ma'am.

Q. What happened with Mr. Rodriguez?

A. After Mr. Rodriguez moved to the left to that position where the wall was, he started to go around it looking into that area. There is no exit, just walls.

He then turned and came back out and passed me again still in the same pumping fashion and went to the other side of the escalator to my right. I am standing there just watching the guy running around in circles.

THE COURT: Maybe that's the way he walks.

THE WITNESS: He ran to the right and went that way. He ran back and got right in front of me. He looked at me square in the face. He said, "Oh, shit."

BY MS. COHAN:

Q. You were not wearing a uniform, were you?

A. No sir, No ma'am.

Q. You didn't have a gun exposed, did you?

A. No, ma'am.

Q. You didn't have your handcuffs exposed?

A. No, ma'am.

Q. Neither did Detective Facchiano?

A. No, ma'am.

Q. Was there anywhere Mr. Rodriguez could have gone down?

A. Yes, ma'am. There was an exit area that is not marked. There may be sign above it, but it's hard to locate. There is a pair of stairs going down for persons working at the airport and there's also an elevator that people can take down.

Q. Those aren't in the immediate vicinity, is it?

A. The elevator is off to the right approximately 25 to 30 feet away.

Q. Up until this point, what significance did you attach to your observations of Mr. Rodriguez?

MR. WEINER: Objection, Your Honor. This calls for a mental process. What we are looking for is an objective analysis

of what he saw, and what legal significance, if any it has, what he thought in his own mind is irrelevant.

THE COURT: I have to make that determination.

MS. COHAN: Your Honor, what significance it had to this officer based on his training and experience--

THE COURT: What did he do based upon what he saw?

MS. COHAN: That's the question. Obviously it had some significance to him because he did something.

THE COURT: I think that's true, but I would have to decide that issue.

BY MS. COHAN:

Q. What happened after Mr. Rodriguez looked at you and made that exclamation?

A. At that point, I extracted my badge from my right hip and Detective Facchiano who was at this point--Rodriguez

was directly in front of me as he is saying, "Oh, shit", and then Detective Facchiano--I could see him back in the area where Mr. Ramirez is and Blanco. Blanco had stood stationary while he was running back. When he came back the second time, Ramirez was telling--Blanco was telling him to go check the bag, and that's when he turned to the right and came back.

THE COURT: Blanco was saying this?

THE WITNESS: Yes, sir.

BY MS. COHAN:

Q. To whom?

THE COURT: Go check the bag?

THE WITNESS: Right.

BY MS. COHAN:

Q. I'm sorry. Were you finished with your answer?

A. No.

At that point, when he stopped in front of me and said, "Oh, shit", at that point I pulled my badge out and I saw Detective Facchiano reaching for his badge case and I extracted my badge case and I held it out and I said, "Excuse me. I'm a police officer here in Miami. Can I talk to you for a minute?"

Q. The exclamation that Mr. Rodriguez made was in English, wasn't it?

A. Yes, ma'am.

Q. Did you lay a hand on Mr. Rodriguez after this little dance that he had done?

A. No, ma'am.

Q. You just took out your badge and identified yourself?

A. Yes, ma'am.

Q. And you identified yourself as a police officer because you wanted him to be--

THE COURT: Wait a minute. Now, let's ask him what he said.

BY MS. COHAN:

Q. Exactly what did you say?

A. I held my identification out. I said, "Excuse me. I'm a police officer. Can I talk with you for a minute?" I was sort of half laughing at this point.

MR. WEINER: May the record indicate since this is twice with his unusual tone of voice that the officer is talking like he is talking to a second grader or something, and when he raises his voice--

MS COHAN: I object to the characterization.

THE COURT: Sustained.

He used a different tone of voice. I don't know what significance it has, if any.

[Thereupon a recess was taken and the prosecution's presentation of the testimony of Officer McGee continued]:

THE COURT: All right. Everybody is ready.

BY MS. COHAN:

Q. When you held out your badge to Mr. Rodriguez and asked if he would mind speaking to you for a moment, where was Detective Facchiano?

A. He was a few feet ahead of me and right where Mr. Ramirez was and Mr. Blanco was. He was right next to Mr. Ramirez at this point.

Q. Were you the only two officers in the area?

A. Yes, ma'am, at that time.

Q. Neither of you had your guns drawn, is that correct?

A. No, ma'am.

Q. Neither of you were displaying handcuffs?

A. No, ma'am.

Q. What did Mr. Rodriguez say when you asked if he would mind speaking to you for a moment?

A. When I displayed my identification and identified myself as a police officer and everything, I asked him if I could talk to him for a moment. He said, "Yes sir "

I don't get many yes sirs.

Q. Was your entire conversation with Mr. Rodriguez in English?

A. Yes, ma'am.

Q. Did he answer all of your questions in a coherent fashion?

A. Yes, ma'am.

Q. Did he have any difficulty with English in that he asked you to explain anything you said to him?

A. No, ma'am.

Q. In fact, what you had overheard at this point was all in English also?

A. Everything I overheard was in English, yes, ma'am.

Q. When Mr. Rodriguez said that he would speak to you, what then occurred?

A. At that point, Detective Facchiano had already identified himself to the other two gentlemen and I couldn't overhear the conversation between them, but they proceeded off to the right a little ways out of the way of traffic because it's right in front of the escalator. I asked Mr. Rodriguez if he would mind if we walked over to where his friends were. He turned and proceeded to that direction.

Q. Did you have your hand on his arm?

A. No, ma'am.

Q. Were you touching him at all.

A. No. In fact, I placed my badge back in my pocket at this point.

Q. Did you ask over where his friends were---

MR. WEINER: Objection. The question is did you touch him. Who cares where his badge is. That's not responsive.

THE COURT: Well, he answered it. Go ahead.

BY MS. COHAN:

Q. How far away were Mr. Blanco and Mr. Ramirez from Mr. Rodriguez?

A. At the point that I asked him if he would mind stepping over where they were? I don't know. Maybe 10, maybe 15 feet away, you know. I am not sure. It was just off to the side.

Q. Why had you identified yourself as a police officer?

MR. WEINER: Objection. That calls for a mental conclusion. I cannot cross

examine as to why he did something. The only question is what he did and he can give any reason and that's the reason what we're stuck with. It is a mental process.

MS. COHAN: First of all, Mr. Weiner cannot cross examine at all. Secondly, the reasons behind this officer displaying his badge are extremely relevant to this Motion to Suppress.

THE COURT: Overruled.

THE WITNESS: The reason I had identified myself as a police officer and requested to speak to him at that time was from the observations I had made. First of all, beginning when he was in the ticket purchasing line, the observations I had made of the third gentleman being Ramirez buying the ticket and the secretive passing of messages from--

MR. WEINER: Objection to the conclusion. I ask that it be stricken.

THE COURT: Sustained.

[Thereupon objections and a discussion occurred]

BY MS. COHAN:

Q. Why did you display your badge?

I'm sorry. Why did you identify yourself as a police officer?

A. I identified myself as a police officer for a couple of purposes: Because the observations I had made, number one; number two, so that at the airport when we do in fact ask someone to talk to us, we properly identify ourselves so they do not think we are Hare Krishnas or someone trying to rip them off or something in that manner.

We identify ourselves as a police officer. I do so to show my respectability of the person and in fact that I would just like to hold some conversation with him.

THE COURT: Don't Hare Krishnas usually have their heads shaved?

MS. COHAN: Not anymore, no, sir. Hare

Krishnas wear wigs and clothes like everybody else.

[Objection overruled]

BY MS. COHAN:

Q. Detective Facchiano displayed his badge and identified himself as well, did he not?

A. I observed him reaching for his pocket. I saw his wallet come out which contained his badge case. I cannot testify I actually saw the badge. I don't remember. That's the impression I got from Detective Facchiano.

Q. You made no attempt at all to conceal your identity as a police officer, did you?

[Objection overruled]

THE WITNESS: No, ma'am. That's the first thing I told him.

BY MS. COHAN:

Q. After you identified yourself and Mr. Rodriguez had indicated that he would

speak to you, how far did you and he move to be with Mr. Ramirez and Mr. Blanco and Detective Facchiano?

A. 10 to 15 feet at the most, I would say.

Q. Is the area in which you were standing open to the public?

A. Yes, ma'am.

Q. Were there other members of the public in the area?

A. Yes, Ma'am. There were people coming up the escalators behind us and passing us by.

Q. At that point when you moved to Mr. Ramirez and Mr. Blanco, what occurred?

A. When I moved over towards their direction and Mr. Rodriguez assumed the position with them, you know, I mean he joined the other two gentlemen and John and I were standing there. I asked Mr. Rodriguez at that time, "Would you have any identification? Do you mind showing me some identification? Do

you have an airlines ticket?" He said -- meaning Rodriguez said, "I don't have any." At the same time the guy known to me as Ramirez handed me an airlines ticket and I at that time looked at the airlines ticket. It was an airlines ticket 45136, La Guardia, National Airlines. It was in the name of Martinez, Perez and Rodriguez.

Q. Three people?

A. Yes. ma'am. It was a group ticket, group of three.

Q. Did it indicate the method of payment for that?

A. It was a cash ticket.

Q. Was your primary conversation with Mr. Rodriguez?

A. Yes, Ma'am. That's who I initiated my conversation with.

Q. In fact, Detective Facchiano was talking to Mr. Ramirez and Mr. Blanco?

A. I know he was talking to Mr. Ramirez. Mr. Blanco was sort of left alone at this

point. No one was directing any conversation to him.

THE COURT: Mr. Ramirez is the one that handed you the airline ticket?

THE WITNESS: Yes, sir. The one who purchased the ticket.

THE COURT: And he handed it to you once you asked Mr. Ramirez?

THE WITNESS: Right. As he was talking. When I asked Mr. Ramirez about the identification of the ticket, Mr. Ramirez handed me the ticket without me saying anything to him.

BY MS. COHAN:

Q. In what tone of voice was this conversation being carried on?

A. Just a normal tone.

Q. You had not raised your voice to attract attention?

A. No, ma'am.

Q. Is that correct?

A. No, ma'am.

Q. When you observed the contents of the airline ticket to LaGuardia, did anything occur with respect to it?

A. Looking at the ticket, I asked Mr. Rodriquez, "What's you name?" He said, "Rodriguez." I turned to Mr. Blanco and I said, "What's your name?" So he said, "Rodriguez." I asked, "Wait a minute. There's only one Rodriguez."

[Objection and discussion]

THE COURT: From the officer's testimony, there were two Rodriguezes, apparently. This man identified himself as Rodriguez. Apparently that was the correct identification. I don't see if there is anything amiss there. Let's proceed.

BY MS. COHAN:

Q. After the second individual identified himself as Rodriguez also, did you say anything about that?

A. I said, looking at the picture, I

said, "Wait a minute. I don't understand something. There is only one Rodriguez on this Ticket." Then Mr. Rodriguez and the gentleman, Mr. Blanco, who had said his name was Rodriguez looked at each other and neither one said anything. Then I asked Mr. Blanco, "Well, do you have any identification that I could see?"

He said, "No, I don't have anything."

I said, "You don't have anything?"

MR. WIENER: I object to this as being hearsay. It involves a third party. There is no evidence showing my client was in the presence or heard it. I don't understand the relevance of it. Again, these other people were not charged. I cannot control what other people do or say.

THE COURT: Sustained.

BY MS. COHAN:

Q. The other two names on the ticket besides Rodriguez were Martinez and Perez, is that correct?

A. Yes, Ma'am.

Q. Did you ever get any identification from Mr. Blanco?

A. Yes, Ma'am.

Q. Did that identification which you obtained from Mr. Blanco have the name Blanco or one of the names Martinez or Perez?

A. It had the name Blanco.

Q. What was the physical condition of Mr. Rodriguez during the course of these events?

A. During the course of these events from the point that I had identified myself and at the time we were ensuing conversation as far as identification and everything, Mr. Rodriguez had sat the suitcase down on the floor, and I think there was a chair there. I think he hung the gold bag over the chair, and while he was standing there he was sweating profusely, shaking extremely; extremely shaking, and when I was asking him, you know,

as to his identification, his voice was showing great strains of stress.

MR. WIENER: I would object to that, unless this man is an ears, nose and throat specialist.

THE COURT: Sustained.

MS. COHAN: He can testify as to what he heard.

MR. WIENER: He cannot testify as to what is strained.

THE COURT: With tne omission of the word "strained".

Will you continue, please.

THE WITNESS: The voice was altering between pitches as far as high pitch to low pitch.

BY MS. COHAN:

Q. What was the temperature in the airport on September --

[Discussion]

THE COURT: I could rule at this point

there was no reason to stop this man and for the sake of argument, I am not determining as a matter of fact at this point, but for the sake of argument I could say it was an illegal stop and there was no probable cause for an articulable fact or reasonable founded suspicion to stop this man, but that still doesn't visciate necessarily what occurred thereafter. So, let's go from that point.

MS. COHAN: Thank you, Your Honor.

BY MS. COHAN:

Q. What was the temperature in the airport on September 12, 1978?

A. I don't know. It was air conditioned.

Q. Were you comfortable?

A. Yes, ma'am.

Q. It wasn't warm in there?

A. Not to me.

Q. Were you wearing a jacket?

A. Yes, ma'am.

Q. On September the 12th?

A. Yes, ma'am.

[Objection sustained]

BY MS. COHAN:

Q. What happened after the names on the ticket were examined and Mr. Blanco produced identification in the name of Blanco?

A. There was -- I said something about -- I guess you forgot about this piece of identification. Blanco did not respond with any kind of an answer or anything.

[objection overruled]

THE WITNESS: Blanco made no remark.

BY MS. COHAN:

Q. At that point or in that time fram, did you then advise the three individuals, Mr. Blanco, Mr. Rodriguez and Mr. Ramirez as to your purpose of being in the area?

[Objection overruled]

BY MS. COHAN:

Q. Did you advise Mr. Ramirez, Mr.

Rodriguez and Mr. Blanco as to your purpose for being in the airport?

A. Yes, ma'am. At that point John received some identification from Ramirez and John started the conversation. We are still talking --

[Objection sustained]

BY MS. COHAN:

Q. Did you and Detective Facchiano advise as to your purpose in the area?

A. Yes, ma'am.

Q. What did you say?

A. My words specifically are going to be intermingled with Detective Facchiano's because both of us were talking simultaneously. The indications were that we were officers working at Miami International Airport and that we had a real problem with contraband going through the airport. I further backed that up saying we were narcotics officers and that was our job, to look for narcotics.

Q. Had you at this time asked anybody for a consent to search luggage?

A. No, ma'am.

Q. After you advised them of your purpose, what happened?

A. I made some statement to Mr. Rodriguez about the display of his movements upon coming off of the escalator. I advised him that it caused me some concern from my observations and I asked him at that time, "So would you have any objection if I searched your luggage?"

He said, "I don't."

The suitcase was down on the floor. I am pointing down to the suitcase. He says, "I don't have a key."

Before I could say anything else, Ramirez was watching me at that point and Ramirez said to Rodriguez, "Let him look."

Rodriguez reached in his pocket and extracted a key. It was loose. It wasn't on a key chain or anything. He handed me a key

which I placed in the lock and opened it.

Q. Did you demand that Mr. Rodriguez consent to search of his luggage?

A. No, ma'am. I asked him if he had any objections. He said, "I don't have a key."

Q. Did you tell him anything such as he didn't have a choice in the matter?

A. No, ma'am.

Q. At this point, had Mr. Ramirez' luggage been examined?

A. Mr. Ramirez' luggage was in the process of being examined by Detective Facchiano. Ramirez was watching me. He was the one that answered to open the bag, telling Rodriguez to.

Q. Were there other officers around the three individuals and you and Detective Facchiano?

A. At some point in time, the PSO, the uniform officer that works the security check

point came to our location, Officer Slimp, at which point -- I am not exactly sure, but it was sometime right in this time frame and I am not sure, but it was just prior to the actual search or just after.

Q. After Mr. Rodriguez was told to go ahead and let you look, from where did he take the key?

A. From his pocket, front pocket.

Q. Where was Mr. Rodriguez in relation to his suitcase?

A. He was standing directly behind it. Like it was laying in front of him on the floor.

Q. What did you do with that key?

A. I took the key. I went down and I opened the suitcase at that point.

Q. What did you find, if anything?

A. There was some articles of clothing and there was a pillow case. Inside the pillow case when I pulled the pillow case open,

there were two bags of cocaine, approximately three and a half pounds, and it was like a zip-lock bag. The other one was wrapped up in like a blue adhesive paper-like.

Q. What happened next?

A. I stood up and I said, "John." John looked over. I showed him the cocaine. I dropped it back in the suitcase. I stood up and reached in my back and grabbed my handcuffs and told Mr. Rodriguez, "Turn around and place your hands against the wall. You're under arrest."

At that point Blanco started walking towards me. He said, "Wait a minute." He started saying something. I said, "Hold it right there." Turn around and put your hands against the wall.

He started to go to me. I had a guy I was trying to arrest and I didn't know what was going on.

Q. You had three of them?

A. John made some indication that he was a black belt in karate.

MR. WIENER: Objection as to the relevance.

THE COURT: Sustained.

BY MS. COHAN:

Q. When you told Mr. Rodriguez to turn around and put his hands up against the wall, did you touch him at that point?

A. No.

Q. When was the first time that you touched him?

A. After he and Blanco had both turned and assumed the position against the wall.

Q. Was the first order that you gave to Mr. Rodriguez to turn around and face the wall?

A. As far as I can recall, I told him to turn around, put your hands against the wall. You're under arrest.

Q. Prior to your discovery of the three and a half pounds of cocaine in his luggage,

was Mr. Rodriguez free to leave?

A. Yes, ma'am.

Q. After you placed Mr. Rodriguez under arrest, did you handcuff him?

A. Yes, ma'am.

Q. Was this the first time you removed your handcuffs?

A. Yes, ma'am.

[Subsequent questions and objection sustained]

BY MS. COHAN:

Q. As far as Mr. Ramirez is concerned, was he in any way being employed by the Dade County Public Safety Department in order to get Mr. Rodriguez to go ahead and consent to the search.

A. No, Ma'am.

Q. This is the first time you had ever seen Mr. Ramirez?

A. First time ever I had ever seen any of them.

Q. Nobody had told Mr. Ramirez to tell

Mr. Rodriguez --

MR. WIENER: We will stipulate Ramirez was not working for the Public Safety Department to save some time.

BY MS. COHAN:

Q. Pursuant to Mr. Rodriguez being placed under arrest, was he advised of his Miranda Rights?

A. Yes, ma'am. Detective Facchiano advised him of his Miranda Rights from his Miranda card. We went downstairs and placed him in the vehicle with the evidence and transported him to Station 3 at which time he was read his Rights.

Q. Was that done in your presence?

A. Yes, ma'am. I was driving the car.

Q. Do you know if that was done from the Miranda card that Detective Facchiano carries with him?

A. Yes, ma'am.

Q. Did Mr. Rodriguez indicate that he understood his Rights?

A. Yes, ma'am.

Q. Did he say anything?

A. Yes, ma'am. He said at that time the other two guys are not involved. He said, "It's my dope. I am not going to get those other guys involved."

He says, "I don't want to say anything else."

Q. About how long had you been in conversation with Mr. Rodriguez prior to finding the cocaine from the time you first said excuse me, I'm with the Public Safety Department until you found the cocaine? How long a time is that?

A. Two to three minutes, I would say. It was a short period.

Q. Did you or Detective Facchiano ever strike Mr. Rodriguez?

A. No, ma'am.

Q. Did you ever threaten him in any way?

A. No, ma'am.

[After additional testimony of Officer

McGee, the Court heard argument of defense counsel]

MS. COHAN [the porsecutor]: May it please the Court, first of all, as far as the Terry Frisk which Mr. Wiener referred to, as the Court may be aware, the Terry test is two-fold. They ruled on two separate and distinct issues. One was a stop and the other was a frisk.

Also, the Supreme Court in Terry vs. Ohio included language that a police officer is free to walk up to a citizen on the street and to engage that officer in voluntary conversation. That is followed by the United States versus Wiley. That is also followed by Windfall from the Third District and also followed by State versus Price from the Fourth District.

Even assuming that the Court rules this was an illegal stop, the State is traveling under the theory this was a free and voluntary consent in that the defendant was

always told that he had a choice. He was asked if he minded if he spoke with the officers. He could have said yes, I mind, and walked away.

THE COURT: That has to do with the stopping.

MS. COHAN: Your Honor, it affects the consent. The defendant was also asked would you have any objection, any objections to consenting to a search of your luggage. It was at that point that he said, "I don't have a key." What that reveals--

THE COURT: Well, it does not -- you might imply consent, but it does not give consent.

MS. COHAN: That is correct

THE COURT: I mean, in vitiation it doesn't.

MS. COHAN: However, through his own actions, the defendant consented to a search and he did that by voluntarily pulling out of his pocket where it was concealed from

the officers a key to the padlock of his luggage and handing that key over to the officers.

I think it will be stretching the imagination beyond the breaking point to say that that did not indicate to the officers that the defendant had consented to a search of his luggage. Why else produce a kay from a concealed location to a padlock of a suitcase unless one is consenting? Defense Counsel would have you believe there is no attenuation here. Once an initial illegal stop has been made-- first of all, the State will not concede that the stop was illegal. Secondly, by the officer asking if the defendant had any objections that certainly acts as enough of an attenuation to remove any taint which the Court may have found was the result of an initial unlawful stop.

Thirdly --

THE COURT: You mean you have any objection to what? I'm not quite certain I understand what you're referring to. I understood that the officers said he asked them if he could look in the bag.

MS. COHAN: The officer asked, if you will recall the testimony, do you have any objection if I search your suitcase?

THE COURT: Right. Okay.

MS. COHAN: Another argument has been made to the Court that there is not enough of a time break as far as minutes between the initial contact with the defendant and the subsequent consent. It has never been a requirement of the law that any time break occur between an initial conversation and a subsequent consent. That is simply not a requirement of Scheckloff vs. Bustamente or any succeeding case.

For that I would cite Untied States vs. Venike, 449 Fed.2nd, 91. I would also cite United States versus Troutman and I have

supplied Husted versus State to the Court.

Under the totality of the circumstances in this case, that includes the stipulation by the defense attorney that Mr. Ramirez was in no way acting on behalf of the police department when he told the defendant to go ahead and let him look. No contraband was found in Mr. Ramirez' luggage. He had nothing to find and whether or not he influenced the acts of Mr. Rodriguez has no bearing upon what the State must be required to prove was an act free of police coercion and free of authority that the police might have provided to get Mr. Rodriguez to consent to the search. In fact, the State would suggest that it has sustained its burden of proving that the defendant did, by clear and convincing evidence and freely and voluntarily volunteer to a consent of his luggage.

[Thereupon the court heard argument of defense counsel]

THE COURT: I am going to grant the motion for this reason: I do not think that there has been a sufficient showing by the State that the consent was completely untainted and freely and voluntarily given; that the defendant was never told that he had the right to leave. He was never told that. He had the right to refuse to have his baggage searched and that he never verbalized a consent to the search of his luggage. I do not believe that the intervening statement by a companion to let him look is sufficient in the time frame that occurred here to overcome the taint of the lack of showing that this man had a right to refuse the search of his luggage or he had a right to leave, and therefore under the totality of the circumstances, I am going to grant the motion.

If you will prepare an Order on it, I will sign it.

MR. WIENER: All right.

[FILED MAY 22, 1979]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, CRIMINAL DIVISION,
SPRING TERM, 1979

CASE NUMBER 78-13968

STATE OF FLORIDA,

Plaintiff,

vs.

DAMASCO VICENTE RODRIGUEZ,

Defendant.

ORDER

THIS CAUSE having come before the Court on May 10, 1979, for hearing on the Defendant's Motion to Suppress, and the Court having reviewed said Motion, having heard testimony, received evidence, and the Court having heard argument of counsel and being otherwise fully advised in the premises it is the finding of this Court that:

1. There was no reason to stop the Defendant, Damasco Vicente Rodriguez. The Defendant did nothing which would arouse an

articulable suspicion in the eyes of Detective McGee and Detective Facchiano.

2. Due to the lack of telling the Defendant he had a right to leave, and the lack of telling the Defendant he had a right to refuse to consent to a search, there was an insufficient showing that the consent herein was completely untainted due to the lack of the two things previously mentioned.

3. The statement made by the Defendant's companion did not overcome the taint from the initial innegal stop of the Defendant.

WHEREFORE it is hereby ORDERED and ADJUDGED that the Motion shall be and the same is hereby granted.

DONE AND ORDERED in open court on this 22nd day of May, 1979, at Miami, Dade County, Florida.

/s/Richard Hickey
RICHARD HICKEY
JUDGE, CIRCUIT COURT

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 79-1138

THE STATE OF FLORIDA,

Appellant,

vs.

DAMASCO RODRIGUEZ,

Appellee,

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Rule 9.210(g), the State of Florida files this notice of the following supplemental authorities;

1. United States v. Mendenhall, ___ U.S.___(No. 78-1821 Decided May 27, 1980).

2. State v. Bell, 382 So.2d 119 (Fla. 3d DCA 1980).

IN THE DISTIRCT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1980

CASE NO. 79-1138

THE STATE OF FLORIDA,

Appellant,

vs.

DAMASCO VICENTE RODRIGUEZ,

Appellee.

Opinion filed September 23, 1980.

An Appeal from the Circuit Court for Dade County, Richard S. Hickey, Judge.

Janet Reno, State Attorney and Ira N. Loewy, Assistant State Attorney, for appellant.

Jack R. Blumenfeld; Spain & O'Donnell, for appellee.

Before BARKDULL, HENDRY and SCHWARTZ, JJ.

PER CURIAM.

Affirmed on the authority of State of Battleman, 374 So.2d 636 (Fla. 3d DCA 1979).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NUMBER 79-1138

THE STATE OF FLORIDA,

Appellant,

vs.

DAMASCO VICENTE RODRIGUEZ,

Appellee.

MOTION FOR REHEARING

Pursuant to Fla.R.App.P. 330, the Appellant in this cause files this motion for rehearing of this Court's decision filed on September 23, 1980, and as grounds fore rehearing says:

1. In affirming the trial court's order suppression evidence in this case, this court has overlooked its prior decisions in Myles v. State, 374 So.2d 83 (Fla. 3d DCA 1979) and State v. Mitchell, 377 So.2d 1006 (Fla. 3d DCA 1979), in which this court held that while a conformance, without more, to one or more elements of the drug courier

profile does not amount to articulable suspicion,[1] the existence of certain profile characteristics in conjunction with other specific objective facts which the officer knows from experience are associated with criminality[2] will be sufficient to create a founded suspicion of criminal activity so as to warrant the intrusion of an investigative stop.

2. This Court has also overlooked the fact that unlike the case of State v. Battleman, 374 So.2d 636 (Fla. 3d DCA 1979), in which the investigatory stop of the defendant was based solely upon three (3) of the profile characteristics,[3] the investi-

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[1] See also Royer v. State, case no. 78-1050 (Fla. 3d DCA September 9, 1980)(en banc), rehearing pending, n.6 at 4 slip opinion of court

[2] See Royer v. State, supra. n.4 at 3, slip opinion of court.

[3] In Battleman, the stop of the defendant was based solely upon "the fact that Battleman seemed nervous; he had arrived

gatory stop of the defendant in the case at bar was based upon several other specific, articulable, objective facts, which indicated to the officers that the defendant was engaged in criminal activity. These facts included, in addition to several of the "profile" characteristics observed by the officers at the time the defendant and his companion purchased the defendant's airline ticket (T. 9-10, 40-48), 1. that upon recognizing the undercover officers to be policemen the defendant's companion Blanco told him twice to "Get out of here" (T. 51-52); 2. that the defendant attempted to flee the presence of the officers (T. 52-56); and 3. that upon realizing that there were no readily accessible exists the defendant stopped in front of one of the officers and said "Oh, shit." (T. 56).

(Footnote continued) from San Francisco with one of the same bags; and his ticket showed that he had paid for it in cash." Id. at 637.

3. This Court has also overlooked its holding in State v. Bell, 382 So.2d 119 (Fla. 3d DCA 1979), that "flight from police evidences guilt" Id. at 119-120, and that evidence of flight, coupled with other conduct of the defendant will afford police officers with other conduct of the defendant will afford police officers their articulable founded suspicion necessary to stop and detain an individual as contemplated under Terry v. Ohio, 392 U.S. 1, 99 S.Ct. 1868, 20 L.Ed.2d 884 (1968). Id. at 120. In Bell, supra this court cited with approval the decision in United States v. Pope, 561 F.2d 663 (6th Cir. 1977), which upheld an investigatory stop and detention in an airport based upon evidence that the defendant met some of the "profile" characteristics coupled with evidence of flight.

Respectfully submitted,

JIM SMITH
Attorney General

By _____
IRA N. LOEWY, Assistant
State Attorney

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1980

MONDAY, OCTOBER 27, 1980

CASE NO. 79-1138

THE STATE OF FLORIDA,
Appellant,

vs.

DAMASCO VICENTE RODRIGUEZ,
Appellee.

Counsel for appellant having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy

ATTEST:

/s/[Illegible]
Clerk District Court of
Appeal, Third District

cc: Ira N. Loewy
Jack R. Blumenfeld
Spain & O"Donnell

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1980

WEDNESDAY, DECEMBER 10, 1980

CASE NO. 79-1138

THE STATE OF FLORIDA,
Appellant,

vs.

DAMASCO VICENTE RODRIGUEZ,
Appellee,

Counsel for appellant having filed in this cause motion to stay mandate for 60 days, it is ordered that said motion is granted and the mandate is hereby stayed for a period of 60 days from date hereof.

A True Copy

ATTEST:

/s/Louis J. Spallone
Clerk District Court of
Appeal, Third District

cc: Ira N. Loewy
Jack R. Blumenfeld
Spain & O'Donnell

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1983

THE STATE OF FLORIDA, **
Appellant, **
vs. ** CASE NO. 79-1138
DAMASCO VINCENTE RODRIGUEZ, **
Appellee. **

Opinion filed November 15, 1983.

An Appeal from the Circuit Court for Dade County, Richard S. Hickey, Judge.

Jim Smith, Attorney General and Calvin L. Fox, Assistant Attorney General, for appellant.

Blumenfeld & Cohen and Eric M. Cohen, for appellee.

Before SCHWARTZ, C.H., and HENDRY and BARKDULL, JJ.

PER CURIAM.

Affirmed.

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D., 1983

THURSDAY, JANUARY 5
1984

STATE OF FLORIDA, **
Appellant, ** CASE NO. 79-1138
vs. **
DAMASCO VINCENTE RODRIGUEZ, ** CIRCUIT NO. 78-13968
Appellee
**

Counsel for appellant having filed in this cause application for stay and the court having considered same, it is ordered that said application is granted and further proceedings in this cause in the trial court and this court are hereby stayed pending review by the United States Supreme Court.

A True Copy

ATTEST:

LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District

By_____
Deputy Clerk

cc: Richard Brinker
Calvin Fox
Erick Cohen

SUPREME COURT OF THE UNITED STATES

FLORIDA *v.* DAMASCO VINCENTE RODRIGUEZ

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

No. 83–1367. Decided November 13, 1984

PER CURIAM.

Respondent Damasco Vincente Rodriguez was charged in a Florida State trial court with possession of cocaine with intent to distribute. The State claimed that on September 12, 1978, he had attempted to transport three pounds of cocaine contained in his luggage through the Miami International Airport. Cocaine seized from the respondent following an examination of his luggage at the airport was suppressed by the Florida trial court on the grounds that respondent's rights under the Fourth and Fourteenth Amendments to the United States Constitution had been violated by the search. The Florida District Court of Appeal affirmed the judgment without opinion, citing its earlier decision in *State* v. *Battleman*, 374 So. 2d 636 (1979). This Court originally denied certiorari, 451 U. S. 1022 (1981), but two years later granted rehearing and remanded the case to the Florida Court of Appeals for reconsideration in the light of our opinions in *Florida* v. *Royer*, 460 U. S. 491 (1983). *Florida* v. *Rodriguez*, —— U. S. —— (1983). The Florida District Court of Appeal again affirmed the suppression of the evidence in a one-word order, and the State has again petitioned for certiorari. Because of the Florida court's suppression of the evidence against him prior to trial, respondent has never been tried for the drug offense with which he was charged, and his former attorneys have advised this Court that he is currently a fugitive from justice.

The only witness to testify at the suppression hearing was officer Charles McGee, who was a police officer with the Dade County Public Safety Department. McGee testified

that he had received about 40 hours of narcotics training in the police academy and, after being assigned to the Narcotics Squad, a five week course from the Organized Crime Bureau, which included one-and-one-half to two weeks of training in narcotic surveillance and drug identification. He had received further training under the auspices of the Drug Enforcement Administration, and at the time of his testimony he had 18 months' experience with the airport unit. He also testified that Miami was a "source city" for narcotics.

McGee testified that he first noticed respondent Rodriguez at the National Airlines ticket counter in the Miami airport shortly after noon on September 12, 1978. McGee's attention was drawn to respondent by the fact that he and two individuals later identified as Blanco and Ramirez behaved in an unusual manner while leaving the National Airlines ticket counter in the Miami airport. McGee and Detective Facchiano, who were both in plain clothes, followed respondent, Ramirez, and Blanco from the ticket counter to the airport concourse from which National Airlines flights departed. Ramirez and Blanco stood side by side on an escalator, and respondent stood directly behind them. The detectives observed Ramirez and Blanco converse with one another, although neither spoke to respondent. At the top of the escalator stairs, Blanco looked back and saw the detectives; he then spoke in a lower voice to Ramirez. Ramirez turned around and looked directly at the detectives, then turned his head back very quickly and spoke to Blanco.

As the three cohorts left the escalator single file, Blanco turned, looked directly at respondent, and said, "Let's get out of here." He then repeated in a much lower voice, "Get out of here." Respondent turned around and caught sight of the detectives. He attempted to move away, in the words of officer McGee, "His legs were pumping up and down very fast and not covering much ground, but his legs were as if the person were running in place." Pet. App. 49. Finding his efforts at flight unsuccessful, respondent confronted officer McGee and uttered a vulgar exclamation.

McGee then showed his badge and asked respondent if they might talk. Respondent agreed, and McGee suggested that they move approximately 15 feet to where Blanco and Ramirez were standing with Facchiano, who now also had identified himself as a police officer.

They remained in the public area of the airport. McGee asked respondent if he had some identification and an airline ticket. Respondent said that he did not, but Ramirez then handed McGee a cash ticket with three names on it—Martinez, Perez, and Rodriguez. In the ensuing discussion, McGee asked respondent what his name was and he replied "Rodriguez"; McGee then asked Blanco what *his* name was and he, too, answered "Rodriguez." Blanco later identified himself correctly. At this point, the officers informed the suspects that they were narcotics officers, and they asked for consent to search respondent's luggage. Respondent answered that he did not have the key, but Ramirez told respondent that he should let the officers look in the luggage, which prompted respondent to hand McGee the key. McGee found three bags of cocaine in the suit bag, and arrested the three men. McGee testified that until he found the cocaine, the three men were free to leave. He also testified that he did not advise respondent that he could refuse consent to the search.

The order of the Florida trial court granting the motion to suppress the cocaine reads as follows:

> "(1) There was no reason to stop the defendant, Damasco Vincente Rodriguez. The Defendant did nothing which would arose an articulable suspicion in the eyes of Detective McGee and Detective Facchiano.
>
> (2) Due to the lack of telling the Defendant he had a right to leave, and the lack of telling the Defendant he had a right to refuse to consent to a search, there was an insufficient showing that the consent herein was com-

pletely untainted due to the lack of the two things previously mentioned.

(3) The statement made by the Defendant's companion did not overcome the taint from the initial illegal stop of the defendant."

We think that the trial court's order as affirmed by the District Court of Appeal reflects a misapprehension of the controlling principles of law governing airport stops enunciated by this Court in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), and *Florida* v. *Royer*, 460 U. S. 491 (1983). Because its ruling was made in May 1979, the trial court obviously cannot be faulted for lack of familiarity with these opinions, but the District Court of Appeal's final affirmance of the suppression order on remand from this Court occurred on November 15, 1983, after these opinions had been issued. We think the trial court's order also reflects a misapprehension of legal principles enunciated in *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973).

Certain constraints on personal liberty that constitute "seizures" for purposes of the Fourth Amendment may nonetheless be justified even though there is no showing of "probable cause" if "there is articulable suspicion that a person has committed or is about to commit a crime." *Florida* v. *Royer*, 460 U. S. 491, 498 (opinion of WHITE, J.). Such a temporary detention for questioning in the case of an airport search is reviewed under the lesser standard enunciated in *Terry* v. *Ohio*, 392 U. S. 1 (1968), and is permissible because of the "public interest involved in the suppression of illegal transactions in drugs or of any other serious crime." *Royer*, 460 U. S. at 498–499.

The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest. *United States* v. *Mendenhall*, 446 U. S. 544, 554 (1980) (opinion of Stewart, J.); *Florida* v. *Royer*, 460 U. S. 491, 497 (1983) (opinion of

WHITE, J.). Assuming, without deciding, that after respondent agreed to talk with the police, moved over to where his cohorts and the other detective were standing, and ultimately granted permission to search his baggage, there was a "seizure" for purposes of the Fourth Amendment, we hold that any such seizure was justified by "articulable suspicion."

Before the officers even spoke to the three confederates, one by one they had sighted the plain clothes officers and had spoken furtively to one another. One was twice overheard urging the others to "get out of here." Respondent's strange movements in his attempt to evade the officers aroused further justifiable suspicion, and so did the contradictory statements concerning the identities of Blanco and respondent. Officer McGee had special training in narcotics surveillance and apprehension; like members of the Drug Enforcement Administration, the Narcotics Squad of the Miami Police Department is "carrying out a highly specialized law enforcement operation designed to combat the serious societal threat proposed by narcotics distribution." *United States* v. *Mendenhall*, *supra*, 446 U. S. at 562 (POWELL, J., concurring). Respondent "was approached in a major international airport where, due in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude. . . ." *Florida* v. *Royer*, 460 U. S. 491, 515 (BLACKMUN, J., dissenting).

We hold, therefore, that the trial court was incorrect both in its conclusion that there was no articulable basis for detaining respondent and in its conclusion that there was "taint" resulting from this initial stop. In *Schneckcloth* v. *Bustamonte*, 412 U. S. 218 (1973), we held that the State need not prove that a defendant consenting to a search knew that he had the right to withhold his consent, although we also held that knowledge of the right to refuse consent could be taken into account in determining whether or not a consent was "voluntary." We are unable to determine from the trial court's opinion whether its conclusion with respect to the vol-

untariness of the consent to search the luggage would have been the same had it correctly applied the governing legal principles embodied in the Fourth Amendment.

The petition for writ of certiorari is therefore granted, the judgment of the Florida Court of Appeal is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

FLORIDA *v.* DAMASCO VINCENTE RODRIGUEZ

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

No. 83–1367. Decided November 13, 1984

JUSTICE MARSHALL dissents.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

With increasing frequency this Court seems prone to disregard important differences between cases that come to us from state tribunals and those that arise in the federal system. See *Maryland* v. *Munson*, —— U. S. ——, —— (1984) (STEVENS, J., concurring). As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation. We do not have comparable supervisory responsibility to correct mistakes that are bound to occur in the thousands of state tribunals throughout the land. The unusual action the Court takes today illustrates how far the Court may depart from its principal mission when it becomes transfixed by the spectre of a drug courier escaping the punishment that is his due.

I

Some five years ago a Florida trial judge conducted the suppression hearing in this case and a county narcotics officer testified at some length. The transcript contains a somewhat improbable account of the respondent either running in place or frantically running in circles in the presence of the agent,[1] and the agent identifying himself to the respondent

[1] "THE WITNESS: He was moving in a direction to the left. His legs were pumping up and down very fast and not covering much ground, but the legs were as if the person were running in place. You might say mov-

as a police officer in order to be sure he would not be mistaken for a member of the Hare Krishna.[2]

After hearing all of the officer's testimony, the trial judge stated:

> "Counsel, I am going to rule as a matter of fact that they did nothing wrong, that there was no reason to stop these men for contact or for any other reason at that point in time. The whole case hinges on whether or not there was consent given subsequent to that time. Let me hear your argument to that." Tr. 104.

After hearing argument, the judge ruled that respondent had not voluntarily consented to a search of his luggage. In making that ruling, the judge relied, in part, on the fact that the narcotics agent had not advised the respondent that he had a right to refuse to consent to the search.

Today this Court holds (1) that the officer did have an "articulable suspicion" that justified a temporary seizure of respondent's person; and (2) that the trial judge did not articulate a legally sufficient basis for his conclusion that respondent did not voluntarily consent to the search of his bag. Accordingly, the Court remands the case to the Florida Court of Appeal for further proceedings.

To understand the unusual nature of this disposition, it is necessary to comment on some of the events that have transpired in this litigation during the past five years.

II

On September 23, 1980, after full argument, the District Court of Appeal of Florida for the Third District filed an opinion which reads in its entirety as follows:

> "PER CURIAM.
>
> "Affirmed on the authority of State [v.] Battleman, 374 So. 2d 636 (Fla. 3d DCA 1979)."

The Florida Attorney General did not ask the Florida Supreme Court to review that decision. He did not do so because the Florida appellate system has been carefully structured to enable the state's highest court to concentrate on matters of greater public importance than the possibility that a trial judge's error might not have been corrected by the

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ing slightly to the left. There's a wall or partition there. He ran through that partition and in the area just enclosed off.

"THE COURT: Did he run or walk?

"THE WITNESS: Neither. He was pumping up and down.

"THE COURT: You said he ran up a minute ago. Did he go from a walk to pumping to a run?

"THE WITNESS: Well, Your Honor, I don't know what the right word would be, but his feet are running up and down but he ain't going nowhere except a little at a time.

"Do you understand what I'm saying?

"[THE PROSECUTOR:] Detective McGee, can you come down from the witness stand and show us.

"THE COURT: Like running in place?

"THE WITNESS: Sort of like this (indicating).

"To demonstrate, he was stamping with his suitcase and shoulder bag when the guy told him in a strained tone to get out of here. He turned and looked at me. He was going like that. He didn't know what to do. He was just going crazy. His feet was going up and down and he was moving, but—

"THE COURT: All right. Have a seat.

. . . . .

[THE WITNESS:] "He then turned and came back out and passed me again still in the same pumping fashion and went to the other side of the escalator to my right. I am standing there just watching the guy running around in circles.

"THE COURT: Maybe that's the way he walks." Tr. 52–54.

[2] "[THE WITNESS:] I identified myself as a police officer for a couple of purposes: Because the observations I had made, number one; number two, so that at the airport when we do in fact ask someone to talk to us, we properly identify ourselves so they do not think we are Hare Krishnas or someone trying to rip them off or something in that manner.

"We identify ourselves as a police officer. I do so to show my respectability of the person and in fact that I would just like to hold some conversation with him.

"THE COURT: Don't Hare Krishnas usually have their heads shaved?" Tr. 64–65.

intermediate court of appeal. As the Florida Supreme Court explained in a 1958 opinion:

> "We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. . . . The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute." *Ansin* v. *Thurston*, 101 So. 2d 808, 810 (Fla. 1958) quoted with approval in *Jenkins* v. *State*, 385 So. 2d 1356, 1357 (Fla. 1980).

Recognizing that the Florida Supreme Court does not provide a forum for error-correcting review of lower court judgments in that State's judicial system, the Florida Attorney General instead filed a petition for writ of certiorari in this Court. Because the petition did not present any question of general significance, on May 26, 1981, this Court wisely denied certiorari. Presumably because they were convinced that error had been committed, three Members of the Court dissented from that disposition and stated that they "would grant certiorari and reverse the judgment." 451 U. S. 1022 (1981).[3] The Attorney General of Florida then filed a timely petition for rehearing.

[3]The suggestion of summary reversal by the three Justices underscores the point that no one has ever considered this case worthy of plenary review by this Court.

III

Rule 51.2 of this Court's Rules requires that the grounds set forth in a petition for rehearing "must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented." The principal ground advanced by Florida in its petition for rehearing was that a succession of clearly erroneous *per curiam* decisions of the State Court of Appeal was having a devastating effect on its prosecutions. As an "intervening circumstance," it noted that the State had filed a petition for certiorari in *Florida* v. *Royer*, 460 U. S. 491 (1983). In my opinion neither of these grounds satisfied the terms of our Rule. In any event, the petition for a rehearing remained on the Court's docket for the next two years.

Rule 51 further provides that no petition for a rehearing will be granted without an opportunity to submit a response. Sup. Ct. R. 51.3. In 1983, when respondent was at long last asked to respond to the state's petition, we learned that he was a fugitive from justice and no longer was represented by counsel. On May 21, 1983, the Court entered an order granting the petition for rehearing, reversing the judgment of the Court of Appeals and remanding the case to the Florida District Court of Appeal for reconsideration in the light of our opinions in *Florida* v. *Royer*. —— U. S. ——.

IV

On November 15, 1983, the District Court of Appeal of Florida filed an opinion which reads, in its entirety, as follows:

"PER CURIAM. Affirmed."

The Attorney General thereafter filed another petition for certiorari in this Court,[4] and today the Court rewards him

[4]Because the District Court of Appeal's decision in this case was rendered without any statement of reasons, it does not "expressly" decide a constitutional question or "expressly" conflict with other authority as the the jurisdictional provision in the Florida Constitution requires for dis-

for this effort. I continue to believe, however, that this case does not present any legal issue warranting review in this Court.

At the time the District Court of Appeal's opinion was filed, every decision cited in the Court's opinion today had already been decided. Presumably, the petitioner called all of those cases to the attention of the Florida District Court of Appeal. Since the Court does not purport to announce any new principle of law, it is also fair to presume that the Florida District Court of Appeal was already familiar with the legal principles discussed by the Court today. Thus, the Court performs the error-correcting function that the Florida Supreme Court has refused to perform, and reverses the state court's judgment by applying settled principles to the facts of this case.

V

The Court's opinion today is flawed in at least two respects. It is highly unusual for this Court to undertake *de novo* review of the factual findings of a state court on the "articulable suspicion" issue. My colleagues did not hear the witness testify; they have insufficient time to study the transcript with the care that is appropriate to credibility determinations; and, indeed, collectively they have only minimal experience in the factfinding profession.

Moreover, the Court's disposition of the consent issue implicitly assumes that the Florida Court of Appeal has a duty to explain its reasons for affirming the trial court's judgment. If that court, upon remand, simply enters another one-word order affirming the trial court's judgment, I would suppose that this Court would have to interpret the ruling as a determination on the existing record that the respondent did not voluntarily consent to the search of his luggage. A petition for certiorari on that question would present "a fact-bound

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cretionary review in the Florida Supreme Court. Fla. Const. Art. V, § 3(b)(3). See *Jenkins* v. *State*, 385 So. 2d 1356, 1357 (Fla. 1980).

issue of little importance." *Massachusetts* v. *Sheppard*, —— U. S. ——, —— n. 5 (1984). If we presume, as I think we should, that the judges of that court were already familiar with the cases discussed in this Court's opinion, I do not understand why we should not make the same assumption on the record as it presently exists.

VI

There is a certain irony in the fact that respondent is a fugitive from justice. If he is apprehended, he probably will be punished for his flight from justice even if the suppression order is ultimately upheld. Perhaps this Court's tireless efforts to bring this one man to justice will result in convictions on both counts. In either event, I believe this Court should abandon its error-correcting role in cases on direct review from state courts. Instead, the Court ought to take a lesson from the Supreme Court of Florida and focus its attention on issues of overriding importance to the administration of justice. The single-minded achievement of results in individual cases is not a virtue that should characterize the work of this Court.

I respectfully dissent.